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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 803

IN THE MATTER

of

SIDNEY SARNER,
Charged With Criminal Contempt,

Appellant.

ON APPEAL FROM FINAL JUDGMENT OF
THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Preface

Reflections of Appellant

That man as creature has been created is Truth. Thence for such reason man's Creator must be Truth. Then by reason of the Judicial Oath, present man must have conceived his law in the endeavor to seek Truth's reflection to Justice. Thus, as through time, Truth has ever abided by reason that our Being has such understanding. Then too, it must reflect that Truth in Justice must be an entity for right to be sustained in certainty.

In such abidance do I reverence the Living Truth and rely upon its irrefutable Law of Justice, to which all man has an endowed right. It being, that Truth is all ways right, hence it is ever correct, thus for such reason it can never be wrong. It is this endowed right I seek to have sustained by this appeal. That it is my right to voice the Truth by honest proof, not the much abused freedom of speech which relies upon a sincerity of belief.

The importance of this question lies in the fact that this endowed right reflects to all mankind and if a Supreme Court of any state is permitted to negate such right, then indeed, the entire nation must be in dreadful plight.

Now I come to the highest court in the land with a serious problem I hope it will understand. That is, that a man for voicing Truth by honest proof can be condemned and made a criminal without a jury trial by the Judiciary of a state, because Truth offended one of its members.

Thus too, if Justice by Truth is to abide, another serious question is here to decide, the substance of which the transcript adequately provides. The question being; how

deep within the realm of error can a judge reside and at what boundary does Truth by honest proof decide that the domain of Justice has been denied.

My abidance herein as a preface is not intended to discredit my advocate in any way for he seeks to prevent me from being incarcerated, of which I am appreciative. However, I seek this Court's review so that it may construe why the State of New Jersey endeavors upon the path it now abides and so defies Truth.

The voicings indicated herein are being proffered to this court with the knowledge that commatism will lighten its deliberations in consideration of this appeal for review. However, it is the applicant's hope that the honest endeavor reflected herein will suffice to abide the importance and necessity of a review of this case, in that its substance reflects the rejection of Truth's nutrient from the moral fibre of this nation in great scope.

SIDNEY SARNER

This is an appeal from a final judgment of the Supreme Court of New Jersey, entered on January 5, 1959, affirming a judgment which convicted the appellant of criminal contempt and sentenced him to sixty days' imprisonment. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are properly presented.

Opinions Below

The opinion of the Supreme Court of New Jersey is reported. 28 N. J. 519, 147 A. 2d 244. The opinion of the Superior Court of New Jersey, Appellate Division, is not reported; it is embodied *verbatim* in the opinion of the Supreme Court of New Jersey, cited *supra*. The Superior Court of New Jersey, Chancery Division—Bergen County, did not render an opinion or enter any findings. Copies of the opinion and the judgment of the Supreme Court of New Jersey, the opinion and the "Judgment of Conviction and Warrant of Commitment" of the Superior Court of New Jersey, Appellate Division, and the "Judgment and Warrant of Commitment" of the Superior Court of New Jersey, Chancery Division—Bergen County, are printed herewith as Appendix A, *infra*.

Jurisdiction

(1) The proceedings for criminal contempt, which arose in the course of a matrimonial action in the Superior Court of New Jersey, Chancery Division—Bergen County, were brought and conducted pursuant to the provisions of R.R. 3:8, i.e., Revised Rule 3:8 of "The Revision of the Rules Governing the Courts of the State of New Jersey (1953)". This "Revision of the Rules" is an enactment of the Supreme Court of New Jersey having the force and effect of a statute under the Constitution of New Jersey (see pp. 18-19, *infra*).

(2) The date of the judgment of the Supreme Court of New Jersey sought to be reviewed is January 5, 1959 (Appendix A, p. 1a, *infra*). The Supreme Court of New Jersey is the highest Court of that State. Notice of appeal was filed in that Court on February 4, 1959; amended notice of appeal was filed in that Court on March 2, 1959.

(3) The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257 (2).

(4) Cases believed to sustain the jurisdiction are *King Mfg. Co.* v. *Augusta,* 277 U. S. 100; *Poulos* v. *New Hampshire,* 345 U. S. 395, 402 N.; and *Atchison R. Co.* v. *Pub. Util. Comm'n.,* 346 U. 346, 348-349, holding that the term "statute of any state" (28 U. S. C. Sec. 1257 (2)) includes every legislative action to which a state gives the force of law; and *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, and *Standard Oil Co.* v. *Johnson,* 316 U. S. 481, holding that a proper case for appeal is presented where the validity of a state statute, as construed and applied, is drawn in question on the ground of repugnancy to the federal Constitution.

(5) The validity of R.R. 3:8, as applied in this case to deny the appellant the right to a jury trial, to free speech and to adequate notice and hearing is involved. Related provisions of the Constitution, statutes, and "Revision of the Rules Governing the Courts" etc., of New Jersey, the constitutionality of which is not involved, but which have a bearing on the case, are Article I, paragraphs 9 and 10 of the Constitution of New Jersey (1947), relating to the right of trial by jury; Article I, paragraph 6 of the latter Constitution, relating to liberty of speech; N.J.S. ("New Jersey Statutes"), Title 2A ("Administration of Civil and Criminal Justice"), Chapter 10, Sections 1 and 3 (officially cited as N.J.S. 2A:10-1 and 3), relating, respectively, to contempts of court in general, and appellate re-

view of contempt convictions; R.R. 1:5-2, relating to appellate review of contempt convictions, together with R.R. 2:5, making R.R. 1:5-2 applicable to appeals taken to the Superior Court of New Jersey, Appellate Division; and R.R. 4:87, which sets forth in the "Rules of Civil Practice" of the aforementioned "Revision of the Rules" etc. provisions on contempt paralleling those of R.R. 3:8 (in the "Rules of Criminal Practice"). All of the provisions above mentioned are printed herewith in Appendix B, *infra*.

Questions Presented

The appellant, a layman, was convicted and sentenced to sixty days' imprisonment for criminal contempt. The alleged contempt consisted of oral statements in open court during a matrimonial action in which the appellant was the defendant spouse. The gravamen of the alleged contempt was disrepect to or criticism of the trial judge personally, not interference with or obstruction of the proceedings, which undisturbedly went on to completion. Not until three months and one week after his allegedly contemptuous conduct, and not until three months and six days after completion of the trial in the matrimonial proceeding, was the appellant cited for contempt therefor. The contempt proceedings (which took place another seventeen days later) were nevertheless conducted as though an emergency requiring immediate prophylaxis existed, i.e., the contempt proceedings were conducted as summary proceedings for criminal contempt, without a jury, pursuant to R.R. 3:8. The incongruity of resort to summary procedures was underscored by the assignment of another judge to conduct the contempt proceedings, thus further belying any urgency in the situation and instead bespeaking its reposefulness. The contempt proceedings were conducted so summarily that the appellant had no effective

opportunity to try the issue of intent or of the factual justification of the criticisms made by him which had resulted in the contempt citation. The record in the matrimonial action supports the view that legitimate triable issues of fact existed in those respects. Also, the appellant was not apprised until the time of the "hearing" that the contempt alleged was criminal in nature. The questions presented are:

1. Whether the decisions, or any decision, of this Court have reached a considered and settled conclusion that the Fourteenth Amendment to the Constitution of the United States imposes no requirement on any state to afford the right of jury trial in prosecutions for crime, or in prosecutions criminal in their nature; or whether, instead, the expressions contained in decisions of this Court which look to such a conclusion have all involved factual situations of a civil not criminal nature or situations of a criminal nature where the facts fall short of outright denial of the right of jury trial *in toto*.

2. Whether this Court is disposed in this appeal to reconsider its ruling in *Eilenbecker* v. *District Court*, 134 U. S. 31, that the federal Constitution does not require jury trial in prosecutions for criminal contempt in state courts.

3. Whether, if questions 1 and 2 present constitutional issues deemed to have vitality, R.R. 3:8 is unconstitutional as applied to the appellant in that it (a) permits denial of the right to jury trial in criminal contempt proceedings, (b) was applied so to deny jury trial to the appellant, and (c) thereby deprived him of liberty without due process of law and abridged his privileges and immunities as a citizen of the United States, in contravention of the Fourteenth Amendment.

4. Whether R.R. 3:8 is unconstitutional in that the summary powers it vests in the New Jersey state courts were

applied to the appellant in such manner as to deny him adequate notice and hearing in contravention of the due process clause of the Fourteenth Amendment, the inadequacy consisting in this: (a) that the appellant was not adequately apprised as to the criminal nature of the contempt proceeding; and (b) that he was not afforded an adequate trial of the factual issues as to his guilt or innocence.

5. Whether, apart from the effect of R.R. 3:8 as set forth in question no. 4 above, the appellant was denied adequate notice and hearing in contravention of the due process clause of the Fourteenth Amendment.

6. Whether the matter on account of which the appellant was convicted was within the right of free speech protected by the Fourteenth Amendment, and whether such right was abridged.

7. Whether the denial of jury trial violated the Fourteenth Amendment guarantee of such trial with respect to issues of free speech.

Statement of the Case

1. The Basis of the Alleged Contempt

The criminal contempt proceeding involved in this appeal arose in the course of a matrimonial action instituted against the present appellant by his wife (Julia Sarner) in the Superior Court of New Jersey, Chancery Division—Bergen County. The matrimonial action came to trial, in 1957, on the wife's claim for separate maintenance on the ground of abandonment and on the appellant's counterclaim for certain money allegedly converted by his wife.

At one emotion-charged juncture in this strenuously contested matrimonial action the appellant gave expression in open court to his feelings of aggrievement over what he considered injustices in the case. The episode took place under the following circumstances:

On November 7, 1957, a determination had been made by the trial judge in favor of the wife on her claim for separate maintenance. See the record below in the matrimonial action, printed "Appendix to Appellant's Brief" in the Superior Court of New Jersey, Appellate Division, Docket No. A-471-57, pp. 284a to 288a (cited hereinafter as "App. A. D. N. J., "), which forms part of the Record in this appeal. Thereafter, on December 3, 1957, the appellant was called as a witness by his wife's attorney to ascertain his ability to pay alimony and counsel fees. The appellant's counterclaim alleging conversion by his wife had not yet been ruled upon, but the trial record had developed facts impugning the wife's veracity and her integrity in the marital finances; she had admitted on the stand to having deliberately lied under oath several times as to important matters in the matrimonial proceedings; indeed the trial court ultimately (i.e., on March 13, 1958, which was subsequent to the events now being described) (App. A. D. N. J. 469a to 471a) was to find, on the basis of the nonbelievability of the wife's testimony, against her and for the appellant on the essential issues presented by the latter's counterclaim for conversion. For the appellant, a layman, it was difficult to understand and to reconcile himself to the wife's victory in the separate maintenance dispute, in the face of her vivid impugnment as a witness. *Id.*, 63a, 66a to 68a, 80a to 83a, 91a. Also, the appellant had testified in some circumstantial detail in the matrimonial action that there had been improper collaboration between a former attorney of his and the attorney of his wife, in that a consent order for payment of support *pendente lite* had been signed and entered without his consent. *Id.*, 274a to 280a.

It was against this background that the appellant was called as a witness by his wife's attorney on December 3, 1957 on the issue of his financial ability—the trial having

been completed as to all other issues. Upon taking the witness stand the appellant requested and was given permission to make a statement. There ensued a colloquy between the appellant and the trial judge in which the appellant made allegedly contemptuous remarks.[1] These remarks—which directly reflected the appellant's agitation concerning the false testimony of his wife, her financial wrongdoings toward him, and the relations between his wife's attorney and his own former attorney—were to the effect that the trial judge had "failed" to sustain his "oath to uphold the law" and had "condoned * * * perjury, thievery, collusion and contempt for this Court"; and, after the wife's attorney had interjected that the remarks were "contempt", the appellant further stated that he was "in contempt of such justice", but "not in contempt of the Court. I am in contempt of the abomination of the justice there." An intimation by the appellant that he would resist giving further testimony "until my points are proven true or false" was not carried out, as, after a short recess, the trial resumed on the same day (December 3, 1957)[2] and the appellant testified freely and fully, as appears in the transcript of the testimony in the matrimonial action, which, as mentioned, forms part of the Record herein (App. A. D. N. J. 319a to 431a).

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[1] The trial judge's certification of the words constituting the alleged contempt appears in the printed "Appendix to Appellant's Brief" in the Supreme Court of New Jersey, Docket No. 2699, pages 2a to 3a, nine additional copies of which are filed herewith (hereinafter cited as "App. S. Ct. N. J. ——"). The complete transcript of the episode appears at *Id.*, pp. 5a to 9a.

[2] Apparently the Supreme Court of New Jersey and the Appellate Division both thought, quite erroneously, that the trial of the matrimonial action was not resumed on the same day but remained interrupted until the day following. See Appendix A, *infra*, page 5a.

2. The Events Between the Date of the Alleged Contempt (December 3, 1957) and the Date of the Contempt Trial (March 27, 1958)

The appellant's testimony in the matrimonial action on the issue of his financial ability was concluded on December 4, 1957, which was the day following the above-described episode of the alleged contempt. App. A. D. N. J. 431a. This was followed by equally cooperative testimony from the appellant's accountant, with the appellant's approval. *Id.* 431a to 467a; App. S. Ct. N. J. 29a. Later that same day (December 4, 1957), the trial in the matrimonial action now having been entirely concluded, the subject of the alleged contempt of the preceding day came up in colloquy (App. S. Ct. N. J. 27a to 35a). The appellant on this occasion endeavored, with entire courtesy, to explain to the court that he believed he had a factual basis for stating there had been "perjury" etc. in the case; and, in emphasizing the sincerity of his beliefs about this, he volunteered the statement that his remarks of the preceding day had been "thought about" and "not spontaneous". *Id.* 31a to 32a. When the court rebuked him for having accused it of "condoning" such improprieties, the appellant apologetically suggested, "It may be you haven't observed them." *Id.* 32a. The court then stated, "I am to certify him for contempt. Prepare an order for his commitment." *Ibid.* Appellant's attorney urged that if there was to be a certification there ought to be a hearing. *Ibid.* Then the court remarked, "Had I acted with it summarily, the hearing would have been suspended. Yes, I think he would have been in jail. * * * But I was interested in getting this case to a conclusion." *Id.* 33a. A few moments later the court said, "I am perfectly willing that he have a hearing. But I have to dispose of it summarily. It was done in my presence." *Ibid.* The Court then announced that it would "dispose of the contempt" at 9:30 the follow-

ing morning. This appearing, upon further colloquy, to be inconvenient, the date for the contempt hearing was left open (*Id.* 34a to 35a), the court once more indicating that the hearing would be "summary" (*Id.* 35a).

The events recounted in the preceding paragraph took place on December 4, 1957—the same day on which the matrimonial trial was concluded. It was not until March 10, 1958 that the appellant was actually cited for or charged with contempt. The citation or charge was by an order to show cause returnable March 27, 1958 (*Id.* 1a), based upon a certification by the Chancery trial judge dated March 6, 1958 (*Id.* 2a to 4a; see also Transcript Annexed to Certification, *Id.* 5a to 9a). The charge was the making of "statements involving disrepect to and criticism of the judge * * * sitting in the cause". *Id.* 1a. Neither the order to show cause nor the certification identified the alleged contempt as criminal or civil, nor did either document characterize the proposed proceedings as "summary". *Id.* 1a to 9a.[3] The original trial judge disqualified himself and another judge was assigned to hear the contempt charges. *Id.* 1a, 3a to 4a.

3. Resumé of the Proceedings at the Contempt Trial

At the contempt hearing (March 27, 1958) on the return of the order to show cause the appellant appeared *pro se* (counsel who accompanied him participated only at the end of the proceeding, on the application for bail) (*Id.* 11a, 24a).[4] The hearing was "summary" in all of the usual

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[3] The only other document in the launching of the contempt proceedings, namely, the "Order Designating Attorney to Prosecute Contempt Proceedings", was likewise silent as to these matters. *Id.* 10a.

[4] The complete transcript of the contempt hearing is before this Court in the printed "Appendix to Appellant's Brief" in the Supreme Court of New Jersey, of which, as mentioned, nine additional copies are filed herewith. App. S. Ct. N. J. 11a to 24a.

senses of the word, as appears from the following resumé, in which we account for every line and page of the transcript:

[1] The prosecuting attorney made his formal opening (*Id.* 11a, lines 1 to 13). **[2]** The appellant pleaded (not guilty) (*Id.* 11a, lines 14 to 17). **[3]** The appellant inquired whether the charge was civil or criminal (*Id.* 11a, lines 17 to 22). **[4]** There ensued a colloquy in which the appellant acknowledged service of the contempt papers, reaffirmed his "not guilty" plea, and again asked whether the charge was criminal or civil (*Id.* 11a, lines 23 to 35). **[5]** The court asked the prosecuting attorney, "Do you wish to answer?" The latter replied that the charge was criminal contempt (*Id.* 11a, line 36 to 12a, line 28). **[6]** Next the transcript reads:

> "Mr. Sarner: Before you make a decision on it * * *.
> "The Court: We want to hear the whole matter. The Court doesn't jump at decisions."

(*Id.* 12a, lines 29 to 31). **[7]** The appellant, obviously assuming that the proceeding was not yet really underway in view of the court's last-quoted remark seemingly deferring decision on the question of civil or criminal, next remarked desultorily that in his criticism of the matrimonial proceedings he had "no contempt for the law" and "did not reflect disrespect for the court" but felt he was factually justified. *Id.* 12a, line 32 to 13a, line 10. **[8]** The court then read excerpts from the contempt certification and asked the appellant to acknowledge that they constituted improper criticisms of the trial judge, to which appellant's replies were along the same general lines as noted in item **[7]**, *supra* (*Id.* 13a, line 11, to 14a, line 19). **[9]** The court then told the appellant that appeal is the orderly method of correcting trial errors (*Id.* 14a, lines 20 to 30). **[10]** The court next noted the appellant's refusal to testify, to

which the appellant responded, "That, sir, was retracted because I did continue with my testimony." (*Id.* 14a, line 31 to 15a, line 5). **[11]** The court next asked the prosecuting attorney to state his views. The latter reviewed the facts as certified and introduced also facts as to the incident on the day following the alleged contempt when the appellant said his action was "not spontaneous" (*Id.* 15a, line 6 to 17a, line 29). **[12]** The appellant then stated, "As I understand this proceeding we are only now arguing on the point of whether civil or criminal." The court replied, "The Court has determined it is criminal contempt." The appellant, plainly surprised, stated he had not realized that.[5] The court reiterated that "it is a criminal contempt" and added, "Now, you might be heard in mitigation, or something like that", whereupon the appellant requested a jury trial of such criminal charge, "by my constitutional right." *Id.* 17a, line 30 to 18a, line 11. **[13]** The court, ignoring the request, proceeded to ask the appellant to admit that the allegedly contemptuous incident had occurred in open court, which the appellant compliantly admitted. *Id.* 18a, lines 12 to 22. **[14]** However, when the court immediately next asked the appellant to admit also the accuracy of the transcript, the appellant, evidently bethinking himself that his jury demand remained not ruled upon and that nevertheless a "trial" was now underway in earnest, made no such further admission and instead urged that it had been prejudicial to him to permit the prosecutor to present what he (the appellant) now belatedly realized was proof and argument on the merits when he "did not yet comprehend" even that the charge was criminal contempt. *Id.* 18a, lines 23 to 32. **[15]** The court evidently did not understand what the appel-

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[5] The appellant was correct. There had been no such determination, as the foregoing Resumé shows.

lant was driving at (*Id.* 18a, lines 33 to 33). It went right on with its interrogation aimed at eliciting admissions from the appellant concerning the contents of the transcript, the interrogation now shifting to the item of the day following the original incident (i.e., appellant's statement that "It was not spontaneous") (*Id.* 18a, line 38 to 19a, line 8). **[16]** The appellant objected to the "entering" of this item (which was not in the original contempt certification—see *Id.* 15a, lines 20 to 35; *Id.* 18a, line 38 to 19a, line 8) as being "out of context" in that it was not accompanied by "the proof that I gave the Judge that what I said was in truth * * *. The rest followed what I proved to the Judge that it was the truth." *Id.* 19a, lines 9 to 25. (Appellant was here referring to remarks made by him on December 4, 1957, the day following the alleged contempt, summarizing his contentions as to "perjury" etc.—see *Id.* 31a to 32a, and p. 6, *supra.*) **[17]** The prosecutor next urged that jury trial should be denied in the exercise of the court's discretion conferred by R.R. 4:87-3 (or R.R. 3:8-3); the appellant urged that the questions of fact as to perjury etc. needed to be "substantiated by a jury"; the court seemingly miscontrued the appellant's position as seeking to prove before a jury discreditable "condoning" by the trial judge rather than the underlying facts of "perjury" etc. as such. *Id.* 19a, line 26, to 20a, line 30. **[18]** Thereupon the court denied a jury trial, as "no need or purpose would be served, inasmuch as the words on the certification speak for themselves." *Id.* 20a, lines 31 to 34. **[19]** In the very next (or same) breath the court announced the appellant guilty of criminal contempt, and the proceeding shifted directly into the matter of sentencing. Just before being sentenced, the appellant once more asserted his jury trial contention, this time in terms of reservation and non-waiver of his rights. A sentence of sixty days was imposed. *Id.* 20a, line 34, to 23a, line 33. **[20]** The remainder of the hearing dealt with bail. *Id.* 23a, line 34, to 24a.

4. The State Court Appeals

On appeal to the Appellate Division of the Superior Court of New Jersey (where the procedure in appeals from summary contempt convictions calls for a form of review *de novo* on the record and a *de novo* judgment and sentence),[6] the appellant's conviction and sentence were sustained (Appendix A, p. 9a, *infra*). The appellant's federal constitutional objections as to free speech, jury trial, and fair trial were rejected, as is more fully set forth below under our heading "How The Federal Questions Are Presented". The Appellate Division ruled also that the evidence established guilt of criminal contempt. *Id.*, pp. 3a to 10a, *infra*.

On appeal to the Supreme Court of New Jersey the judgment of the Appellate Division was affirmed *per curiam* "for the reasons expressed in the opinion" of the Appellate Division. *Id.*, pp. 1a, 8a, *infra*.

Execution of the judgment of the Supreme Court of New Jersey is presently stayed.

How the Federal Questions Are Presented

1. In the Contempt Trial

(In view of the New Jersey practice of requiring trial *de novo* on the record in appeals from convictions of criminal contempt (the authorities are set forth at pp. 22-23, *infra*), any defects in the appellant's proper presentation of the federal questions at his original contempt trial would appear to be curable by proper presentation of the questions in the Appellate Division.)

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[6] This feature of the New Jersey appellate procedure in contempt cases is further treated at pp. 22-23, *infra*.

The appellant's efforts (acting as attorney *pro se*) in the contempt proceedings in the Superior Court of New Jersey, Chancery Division—Bergen County, to preserve his claim of right to a jury trial and to adequate notice and hearing of the charge of criminal contempt, have been described in detail in our "Resumé" treatment at pp. 9-12, *supra.*

The jury trial point was expressly put by the appellant on "constitutional" grounds. App. S. Ct. N. J. 18a, line 8. (See also *Id.* 23a, line 21, where the words "constitutional right" are obviously misprinted as "constitute a right".

The point as to adequate notice and hearing pervaded appellant's entire remarks in that proceeding (see, again, our "Resumé" treatment at pp. 9-12, *supra*), and although it was not distinctly formulated in "constitutional" terms, it was plainly so intended in view of its being interwoven throughout with the jury trial point (e.g., App. S. Ct. N. J. 20a, lines 27 to 29). As to the claim of the right of free speech, appellant showed his intention in that regard at *Id.* 21a, line 40, to 22a, line 13; and 22a, lines 21 to 28.

The Chancery Division trial judge, as shown in our aforementioned "Resumé", p. 12, *supra,* expressly denied a jury trial, exercising the discretion vested in him by R.R. 3:8-3 (or 4:87-3). Necessarily he also denied the right to introduce proofs substantiating appellant's statements as to "perjury", "thievery" etc., for, as seen, the denial of a jury trial was expressly based on the trial judge's oral finding that "no need or purpose would be served, inasmuch as the words on the certification speak for themselves." App. S. Ct. N. J. 20a, lines 32 to 34. This oral finding was made within moments after the prosecutor had argued to the same effect (*Id.* 19a, lines 26 to 40). The Chancery Division trial judge also necessarily re-

jected the claim of the right of free speech, as he convicted the appellant of criminal contempt for making the statements as to which that right was claimed.

2. In the Appellate Division

The "Brief for Appellant" in the Superior Court of New Jersey, Appellate Division—Docket No. A-354-57 (which is before this Court in the Record herein) contained, in the "Statement of Questions Involved", the following:

> "1. Did the defendant's conviction of criminal contempt violate his constitutional right of free speech?
>
> • • •
>
> "3. Does due process require that a defendant prosecuted for criminal contempt be given a trial by jury if he makes application for it?"

Point I of the said Brief (pp. 2 to 4) argued the free speech contention. Point III of that Brief (pp. 7 to 13) argued that the denial of jury trial in a prosecution for criminal contempt, which is "inevitably a criminal trial" (*Id.*, p. 7, line 31), deprives a person "of his liberty without due process of law in violation of the Fourteenth Amendment of the United States Constitution • • •." (*Id.*, p. 7, line 25). As to the claim of denial of adequate notice and hearing, see the same Brief at p. 8, line 34, to p. 9, line 22; p. 10, lines 7 to 11; p. 13, lines 16 to 20; p. 14, lines 18 to 30. See also Point IV of the aforementioned Brief (pp. 13 to 14), which argues that the trial judge erred in not making findings—a point which, as such, we do not urge in the instant appeal, but which is of collateral significance in view of our claim herein that the overall summariness of the procedure resulted in an inadequate hearing. Further in connection with our latter claim (and pertinent also to our claim of unconstitutional denial of a jury trial), our

aforementioned Brief argued, in the free speech point (Point I, pp. 3-4) that the circumstances of the case did not require or justify resort to summary methods of trial inasmuch as "The defendant's remark did not impede the orderly administration of justice" (*Id.*, p. 3, line 20).

The Appellate Division expressly rejected appellant's federal constitutional contentions as to free speech (Appendix A, *infra*, p. 6a) and jury trial (*Id.*, pp. 6a to 7a). On the jury trial point that court expressly cited R.R. 3:8-3 as permitting discretionary denial (*Id.*, p. 7a, line 11).

As to the question of fair trial or adequate notice and hearing, the Appellate Division's rejection of appellant's contentions was based on a recital by it of the facts of what transpired at the contempt trial (Appendix A, *infra*, pp. 4a to 6a). Because issues of constitutional fact are involved, we must mention in this jurisdictional presentation that that recital was manifestly erroneous in several vital respects, to wit, that the appellant "undertook to state his defense;" that he "admitted the certification * * * was correct;" that the reason why, after the denial of jury trial the trial judge went on immediately to make his determination of guilt, was that "No further defense [was] tendered by defendant;" and that the interruption of the matrimonial proceedings involved a delay of an entire day. Our "Resumé" treatment at pp. 9-12, *supra*, shows that all of these findings by the Appellate Division were clearly erroneous. These errors, we report, are mentioned here solely for their bearing on the question of the manner in which the federal questions are presented; i.e., appellant's claim of denial of an adequate hearing was rejected by the Appellate Division chiefly because that Court fundamentally misconceived the "constitutional facts" as to what had occurred; cf. *Fay* v. *New York*, 332 U. S. 261, 272. In addition, see Appendix A. p. 7a, *infra*, where, again,

the constitutional facts were erroneously understood by the Appellate Division, in that the appellant's plea in the contempt trial for the right to present proofs as to the truth of his charges of perjury, etc. was lost sight of behind a technicality as to non-proffer by him of the matrimonial trial transcript then and there; and likewise lost sight of was the appellant's position that the presentation of such proofs ought to be made to a jury, which the Appellate Division circularly reasoned away by the simplistic conclusion that there was no jury issue.

The Appellate Division necessarily sustained the federal constitutionality of R.R. 3:8 in connection with the issues of jury trial and adequate notice and hearing, for the contempt proceedings were conducted pursuant to that provision (or to the substantially identical provisions of R.R. 4:87), and it was in pursuance thereto that jury trial was denied and the summary contempt power invoked against the appellant with the procedurally aggrieving consequences heretofore mentioned. Appendix A, *infra*, pp. 5a to 8a. (Our foregoing remarks relating to the impingement of R.R. 3:8 in the Appellate Division are equally applicable to the proceedings in the Chancery Division.)

3. In the Supreme Court of New Jersey

The "Brief for Appellant" in the Supreme Court of New Jersey, Docket No. 2699, is part of the Record in this Court. The "Statement of Questions Involved" in that Brief contains the following:

> "1. Does the denial of a trial by jury in a prosecution for criminal contempt deprive the defendant of his constitutional right of due process?
>
> 2. Did the defendant's conviction of criminal contempt violate his constitutional right of free speech?"

Point I of the aforementioned Brief (pp. 3-11), relating to jury trial as a matter of Fourteenth Amendment due process, is substantially the same as Point III of the appellant's Brief in the Appellate Division, described at pp. 15-16, *supra*. Point II of the Appellant's Brief in the Supreme Court of New Jersey (pp. 11-13), relating to free speech, is substantially the same as Point I in his Brief in the Appellate Division (p. 15, *supra*). All of the appellant's arguments cited at pp. 15-16, *supra*) from his Brief in the Appellate Division relating to the issue of fair trial or adequate notice and hearing, were presented in substantially the same language in his Brief in the Supreme Court of New Jersey (p. 4, line 23, to p. 5, line 10; p. 5, lines 28 to 32; p. 6, lines 30 to 40; p. 16, lines 18 to 32; see also Point II, pp. 11 to 13, and Point IV, pp. 15-16).

Since the *per curiam* opinion of the Supreme Court of New Jersey consisted, except for the formal parts, solely of a *verbatim* incorporation of the complete text of the opinion of the Appellate Division, our discussion at pp. 16-17, *supra*, of the latter opinion showing how the federal questions were determined in the Appellate Division makes unnecessary a separate showing of how those questions were determined in the Supreme Court of New Jersey.

The Questions Are Substantial

In the paragraphs numbered 1 to 4 below we treat the jurisdictional matters mentioned in the first portion of this Court's Rule 15 (1) (e). The matter of the substantiality, as such, of the questions is treated in subsequent paragraphs.

1. The authorities establishing that provisions of the class of New Jersey's court rule R.R. 3:8 possess statutory (and indeed supra-statutory) force and effect are, e.g., *Winberry* v. *Salisbury*, 5 N. J. 240 (1950), cert. den., 340 U. S. 877; *George Sieyler Co.* v. *Norton*, 8 N. J. 374 (1952).

See Kaplan and Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry* v. *Salisbury*, 65 Harv. L. Rev. 234 (1951).

2. Our Statement of the Case, pp. 12, 16, 18, *supra*, shows that R.R. 3:8-3, allowing the court "in its discretion" to "try the issue" of criminal contempt without a jury, was the governing enactment deemed to authorize denial of a jury trial to the appellant.[7] Accordingly, if appellant was entitled by federal constitutional right to a jury trial, then the validity of R.R. 3:8-3 as here applied is drawn in question within the meaning of 28 U. S. C. 1257 (2).

3. The jurisdiction by appeal with respect to the bearing of R.R. 3:8 on the issue of adequate notice and hearing (apart from the question of jury trial) is admittedly less clear, but is submitted as being nevertheless proper. While the Superior Court of New Jersey, Chancery Division, had general jurisdiction to try the appellant for criminal contempt pursuant to N.J.S. 2A:10-1a (Appendix B, *infra*, p. 13a), or may have had inherent jurisdiction therefor (cf. *Ibid.*, N.J.S. 2A:10-1, last paragraph), its power to proceed *summarily* is governed by and exercised under R.R. 3:8 (cf. R.R. 4:87), as is clear from R.R. 3:1-1 (cf. R.R. 4:1-1). (All of the provisions here referred to are printed in Appendix B, *infra*.) Hence, if the appellant had a federal constitutional right not to be tried in the summary manner hereinbefore described (pp. 9-12, *supra*), then the validity of R.R. 3:8 as so applied to him is jurisdictionally here drawn in question in proper manner.

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[7] The only enactments of the New Jersey Legislature providing for trial of criminal or penal offenses without a jury are N.J.S. 2A:3-5, 2A:7-20, 2A:7-24, 2A:7-25, 2A:58-1 and 2A:58-3—none of which applies to contempt proceedings.

4. The jurisdictional propriety of the free speech issue, too, as concerns the impact of R.R. 3:8 thereon, is admittedly less clear than that of the jury trial issue. However, when a statute permitting denial of jury trial works such denial in regard to trial of an issue of abridgment of constitutionally protected speech, the statute aggrievingly touches the free speech right as such, albeit *via* the jury-denial route. Cf. Mr. Justice BRENNAN, dissenting, in *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 447-448. It is submitted also that, apart from this jury trial feature, the perfunctory shrift given below to the appellant's claim of free speech was, in significant part at least, by-produced out of the "summary" apparatus of R.R. 3:8 as applied to him.

5. *Green* v. *United States*, 356 U. S. 165, is not necessarily dispositive of our contention that the appellant's federal constitutional rights were violated by denial of a jury trial. The *Green* case dealt with federal not state power. This difference is not nominalistic. For it entitles us to point out that the exhaustive scholarship devoted by this Court to the jury trial-contempt problem in the *Green* case did not touch state-derived issues as such, either generally or with respect to important special facets we shall mention which are presented by the instant case. Nor has this Court considered the state-level question *de novo* since it first held nearly seventy years ago, in *Eilenbecker* v. *District Court*, 134 U. S. 31, that the federal Constitution does not require jury trial in state prosecutions for criminal contempt.[8] Indeed, as shown in the accompanying

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[8] *Eilenbecker* involved violation of an injunction. The constitutional issue of denial of jury trial was there presented in a factual setting strikingly more unfavorable to the accused than are our facts. This Court found that there could not be "any doubt" either as to "the intentional violation" or that the violators "had a regular and fair trial, after due notice, and opportunity to defend themselves in open court * * *." 134 U. S. at 36.

footnote,[9] in the few instances in which this Court has subsequently cited the *Eilenbecker* case it has done so without new comment; and only two of those were state contempt cases, where, respectively, a jury had not been demanded *(Tinsley)*, and an attorney who was behaving defiantly *in facie curiae* was convicted *instanter (Fisher)*.

6. If, as we contend, the *Green* case does not stand in the way of a re-examination of the *Eilenbecker* rule, and if this Court is disposed to make such re-examination with respect to the issues of state power involved, our plenary argument on the merits would develop the following points to show that the federal Constitution required preservation of the right of jury trial in the instant case: **[A]** The power of the New Jersey courts under R.R. 3:8 to try persons "summarily" for criminal contempt should be tested by the historical and policy considerations advanced in the opinion of Mr. Justice BLACK (joined by the Chief Justice and Mr. Justice DOUGLAS) in the *Green* case, 356 U. S. at 193 *et seq.* See also *Jury Trial for Criminal Contempts*, 65 Yale L. J. 846-860 (1956). **[B]** Our facts are particularly suited for this purpose. See footnote 8, *supra*. Also, the summary procedure was used here not only long after (near-

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[9] *Eilenbecker* has been cited by this Court in *In Re Debs*, 158 U. S. 564, 596 (federal contempt); *Tinsley* v. *Anderson*, 171 U. S. 101, 108 (state contempt, jury trial not demanded); *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 337 (federal contempt); *United States* v. *Shipp*, 203 U. S. 563, 575 (contempt of this Court, *Eilenbecker* cited for another point); *Myers* v. *United States*, 264 U. S. 95, 104 (federal contempt); *Nye* v. *United States*, 313 U. S. 33, 48 (federal contempt, *Eilenbecker* cited for another point); *Fisher* v. *Pace*, 336 U. S. 155, 159 n. (state contempt, attorney disobeying court's limitation on argument); *Green* v. *United States*, *supra* (federal contempt). See also the dissenting opinions in *Bridges* v. *California*, 314 U. S. 252, 286 (state contempt, conviction reversed), and *United States* v. *United Mine Workers*, 330 U. S. 258, 367 n. (federal contempt).

ly four months) the alleged contempt occurred, but also equally long after even the trial in the matrimonial action itself was concluded. Thus by the time the appellant was tried for contempt there did not linger any remotest pretext of authentic governmental need to try him summarily; indeed no such need had ever existed, as the appellant had spoken his short piece (with the court's permission) and had thereafter, following a brief recess allowed by the court, gone on to cooperate fully in bringing the matrimonial trial to a conclusion. To apply the "summary" power over contempts to such a fact-situation is grotesque, and, so far as we have been able to discover, unprecedented.[10] Nor was there present here the usual justification that a jury is unnecessary because the trial judge has direct knowledge of the facts,[11] for another judge was assigned to try the appellant. Under the express provisions of R.R. 3:8-3 itself, a jury could have been allowed in the court's discretion. And there was available state machinery for indicting and trying the appellant as for crime. N.J.S. 2A:85-7; *State* v. *Zarafu*, 35 N. J. Super. 177, 182 (App. Div. 1955); *State* v. *Janiec*, 25 N. J. Super. 197, 200 (App. Div. 1953). The "de novo" review required in the Appellate Division in an R.R. 3:8

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[10] Cf. *Sacher* v. *United States*, 343 U. S. 1, 5 (also see *Id.*, 36-37 (Mr. Justice FRANKFURTER, dissenting)); *In re Oliver*, 333 U. S. 257, 275, 277-278; *Cooke* v. *United States*, 267 U. S. 517, 536. See also *Fisher* v. *Pace*, 336 U. S. 155, 167 (Mr. Justice MURPHY, dissenting); *United States* v. *Sacher*, 182 F. 2d 416, 463-466 (C. A. 2, 1950) (Judge CLARK, dissenting), affirmed, 343 U. S. 1; *Annotation*, 96 L. Ed. 762, 766-767. The latter *Annotation* and the *Sacher* case deal with F.R.C.P. 42(a), which is the prototype of New Jersey's R.R. 3:8. *Van Sweringen* v. *Van Sweringen*, 34 N. J. Super. 394, 401 (App. Div. 1955), reversed on other grounds, 22 N. J. 440 (1956).

[11] Cf. *Sacher* v. *United States*, 343 U. S. 1, 9-10; and cases collected in *Annotations* in 96 L. Ed. 762, 764-765, and in 93 L. Ed. 578, 580 n. 1.

proceeding obviously is not a substitute for a jury trial, and in any event it is limited to review on the record, as occurred in this case. N.J.S. 2A:10-3; R.R. 1:5- ; *Zimmerman* v. *Zimmerman*, 12 N. J. Super. 61, 69 (App. Div. 1950). There was no justification, in short, for proceeding here without a jury if the appellant wanted one. **[C]** A federal constitutional requirement of jury trial for this case would be derivable only, of course, from the Fourteenth Amendment. Numerous decisions of this Court (*infra*) contain declarations that the Fourteenth Amendment does not guarantee the right of jury trial in state prosecutions for crime.[12] *But there appears to be no decision of this Court which actually so holds in a factual situation where the right of jury trial was denied in toto* (as was done in the instant case). For example, the latest expression of the Court on this subject ("Of course, the Due Process Clause does not subject the States to the necessity of having trial by jury in misdemeanor prosecutions.") (*Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 444) cited no authorities,[13] and was in a case not involving a criminal prosecution at all, or even any demand for a jury trial. The statement in *Stein* v. *New York*, 346 U. S. 156, 179 ("The states are free to allocate functions as between judge and jury as they see fit.") was made in the context of *de-*

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[12] Authorities viewing criminal contempt as assimilable to "crime" are: *New Orleans* v. *Steamship Company*, 20 Wall. 387, 392; *O'Neal* v. *United States*, 190 U. S. 36, 38; *Gompers* v. *United States*, 233 U. S. 604, 610, 611; *Michaelson* v. *United States*, 266 U. S. 42, 66, 67; *Pendergast* v. *United States*, 317 U. S. 412, 416-418. See also Mr. Justice BLACK, dissenting, in *Green* v. *United States*, 356 U. S. 165, 201-202, n's 10 to 12.

[13] The opinion of the Court was by Mr. Justice FRANKFURTER. In *Adamson* v. *California*, 332 U. S. 46, 59, 62-65, Mr. Justice FRANKFURTER, concurring, elaborately marshalled the authorities, pointing to no case where this (or any) Court approved *actual* denial of jury trial in a criminal prosecution.

fendants' efforts to *limit* the jury's function; and the authorities cited by the Court were all civil cases. The quotation, in *Fay* v. *New York*, 332 U. S. 261, 288, of Mr. Justice CARDOZO's remark in *Palko* v. *Connecticut*, 302 U. S. 319, 324 ("This Court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether.") occurred in the setting of the issue of the constitutionality of "blue ribbon" juries, not in a *no-jury* setting; and *Palko* itself did not involve a jury issue at all—besides which, three of the four cases cited in *Palko* were civil cases and the fourth (*Maxwell* v. *Dow*, 176 U. S. 581) involved an eight-man jury question, not a *no-jury* question. The earliest case, *Walker* v. *Sauvinet*, 92 U. S. 90, was a civil suit; it is apparently the seed of all the later utterances concerning both civil and criminal juries; it was cited in *Palko*, again in *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (defendant's presence during view by jury) where the declaration appears in its most unequivocal form ("Consistently with that amendment, trial by jury may be abolished."), and again as recently as *Stein* (*supra*). See also, e.g., the following criminal cases and the authorities there copiously cited (all of which latter are either civil cases, criminal cases involving fact situations short of total denial of jury trial, or pure dicta): *Hallinger* v. *Davis*, 146 U. S. 314, 320-324 (jury trial waived); *Twining* v. *New Jersey*, 211 U. S. 78, 111 (self-incrimination); *Frank* v. *Mangum*, 237 U. S. 309, 340, 343 (defendant's right to be present at verdict); *Brown* v. *New Jersey*, 175 U. S. 172, 175 (struck jury). We believe we have found all of the cases, criminal and civil (we have above cited only examples), and we repeat, *it appears that there is not a single decision of this Court holding that a state may abolish or deny jury trial altogether in a criminal case where such was actually done.* We therefore submit that the question of whether the Fourteenth Amendment forbids total denial of the right of jury trial in a

state criminal prosecution (or in a state prosecution for criminal contempt, treating such as a criminal prosecution—see fn. 12, *supra*), is open. On that question our plenary argument on the merits would rely, *inter alia*, on the presentations made by Mr. Justice HARLAN (dissenting) in *Hurtado* v. *California*, 110 U. S. 516, 538-558 and *Maxwell* v. *Dow*, 176 U. S. 581, 605-617; and by Mr. Justice BLACK (dissenting—joined by Mr. Justice DOUGLAS; and supported in separate dissenting opinion of MURPHY and RUTLEDGE, *JJ.*) in *Adamson* v. *California*, 332 U. S. 46, 68 *et seq.*, 123. See also Lomen, Privileges and Immunities Under the Fourteenth Amendment, 18 Washington Law Rev. 120-135 (1943).

7. The belatedness of the apprisal to the appellant that he was facing a prosecution for *criminal* contempt in itself presents a substantial question of due process. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 444-452. Further, the procedural confusion which this belated apprisal introduced into the contempt trial proceedings fatally impaired the fairness of that "trial", as it sucked the appellant into that whirlpool we have described wherein he found himself "tried" before he knew the nature of the proceedings or had even had an occasion or opportunity to request a jury trial (i.e., he was deferring this request until he learned whether the proceeding was civil or criminal); and wherein he then moments later found himself, in a single instant, simultaneously denied a jury trial and convicted.

The test of due process for this case is not the streamlined procedure found in those conventionally allowed "summary" situations where the judge has direct personal knowledge of the facts and is moving expeditiously to deal with a present emergency in the courtroom. This "trial" was by another judge, and it occurred both months after the event, and months after any need for on-the-spot

action had passed. The appellant was not given the due process to which *In Re Oliver*, 333 U. S. 257 and *Fisher* v. *Pace*, 336 U. S. 155 entitled him. Further, under the *Fisher* case (336 U. S. at 160) this Court may review the record to determine whether there were "adequate facts to support" the summary order of conviction.

8. As Mr. Justice DOUGLAS (dissenting) stated in *Fisher* v. *Pace*, 336 U. S. 155, 163 (referring to *Bridges* v. *California*, 314 U. S. 252; *Pennekamp* v. *Florida*, 328 U. S. 331; and *Craig* v. *Harney*, 331 U. S. 367): "[In those cases] we narrowly restricted the power to punish summarily for constructive contempts in order to maintain freedom of press and of speech in their preferred position. Freedom of speech in the courtroom deserves the same protection." The appellant's remarks in the matrimonial trial were an expression of sincere distress and honest conviction of truth. He explained that he intended no impugnment of the judge's probity but rather was suggesting that a slippage of the judicial perceptiveness had occurred. "Adequate facts to support an order for contempt of the court" within the meaning of the *Fisher* case, *supra*, cannot be found in this record in isolation from the free-speech considerations. And to the extent that the appellant's way of expressing himself was not *à la mode* of judges and lawyers, we respectfully refer the Court to the humane and urbane suggestions of Professor Max Radin in his essay, *Freedom of Speech and Contempt of Court*, 36 Ill. L. Rev. 599, 615, 619-620 (1942).

CONCLUSION

It is respectfully submitted that the decision below has construed and applied R.R. 3:8 so as to deny to the appellant his rights of jury trial, freedom of speech, and adequate notice and hearing in violation of the due process and privileges-and-immunities clauses of the Fourteenth

Amendment. We believe that the Federal questions thereby arising, being properly presented and substantial, entitle the appellant to invoke the jurisdiction of this Court under 28 U.S.C. Sec. 1257(2). Appellant respectfully prays that, if this matter be deemed inappropriate for review by appeal, the Court may treat the papers as a petition for a writ of certiorari.

Respectfully submitted,

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AARON W. NUSSMAN,
Of Counsel.

[APPENDICES FOLLOW]

Appendix A (Opinions and Judgments Below)

JUDGMENT (MANDATE ON AFFIRMANCE OF THE SUPREME COURT OF NEW JERSEY—JANUARY 5, 1959)

SUPREME COURT OF NEW JERSEY
Appeal Docket No. 2669

JULIA SARNER,

Plaintiff,

vs.

SIDNEY SARNER,

Defendant.

IN THE MATTER

of

SIDNEY SARNER,
charged with contempt,

Appellant.

CIVIL ACTION
ON APPEAL
MANDATE ON AFFIRMANCE

This cause having been duly argued before this Court by Mr. Aaron W. Nussman, counsel for the appellant and Mr. James A. Major, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court, Chancery Division is affirmed

with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court, Chancery Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable JOSEPH WEINTRAUB, Chief Justice, at Trenton on the fifth day of January, 1959.

JOHN H. GILDEA,
Clerk of the Supreme Court.

A TRUE COPY
JOHN H. GILDEA,
Clerk.

Filed January 5, 1959

JOHN H. GILDEA,
Clerk.

Appendix A (Opinions and Judgments Below)

OPINION OF SUPREME COURT OF NEW JERSEY—JANUARY 5, 1959 (28 N. J. 519, 147 A. 2d 244)

SUPREME COURT OF NEW JERSEY
No. A-55 September Term, 1958.

JULIA SARNER,

Plaintiff,

vs.

SIDNEY SARNER,

Defendant.

IN THE MATTER

of

SIDNEY SARNER,
charged with contempt,

Appellant.

Argued December 15, 1958. Decided January 5, 1959.

On appeal from a judgment of the Superior Court, Appellate Division, whose opinion is as follows:

"Defendant appeals from an adjudication of his guilt of criminal contempt of court.

"The proceedings grow out of a matrimonial litigation in the Chancery Division wherein a determination had been made by Judge Hegarty that defendant had abandoned his wife. On December 3, 1957 he was called as a witness by his wife's attorney for the purpose of establishing facts relative to his ability to pay alimony and

counsel fees. Upon taking the witness stand the following transpired:

"Sidney Sarner, previously sworn, testifies as follows:

"The Witness: May I first have something to say to the Court?

"The Court: What is it you want to say, Mr. Sarner?

"The Witness: I mean, I have taken an oath here, your Honor, to tell the truth.

"The Court: That is why I say you have been sworn.

"The Witness: I have something further to say.

"The Court: You may sit down.

"The Witness: In this proceeding you are sustaining your oath to uphold the law. This, sir, you have failed to do.

"You have condoned in this Court perjury, thievery, collusion and contempt for this Court, but not only it becomes my duty to sustain the truth and to oppose such justice but to expose it. Therefore, you may if you wish, I will not further testify under the jurisdiction of this Court. You may by your inclination on my behalf do as you see fit. I will not testify any further.

"After some discussion, in the course of which plaintiff's counsel asked that defendant be committed for contempt at once, and the court indicated it would consider the matter at an appropriate time, the witness volunteered the following:

"The Witness: May I say this by reason of what I voiced. I am in contempt on such justice and will stand in contempt of such justice. By such reason I have a right, and not only a right but a duty to do so. On this basis I will defend myself in contempt. First, before we continue, I am not in contempt of the Court. I am in contempt of the abomination of the justice there. That is what I am in contempt of.

* * *

"• • • There was not one iota of proof before your Honor by their own witnesses that showed I abandoned. "Upon being asked a question on the merits of the application, the witness refused to answer, stating he would stand on his previously stated position.

"The hearing was recessed. It was resumed the next day, and, at one point, defendant said, in reference to his remark of the previous day:

"• • • I had thought about what I was going to do before. It was not spontaneous."

"The trial judge certified the defendant for contempt and the matter was assigned to Judge Nimmo for trial. Defendant was attended in court by the attorney who represents him on this appeal but chose to defend himself at the contempt hearing pro se. He pleaded not guilty and asked to be informed whether the contempt was civil or criminal. The court asked the prosecutor to respond, and the latter stated it was a charge for criminal contempt. The defendant then undertook to state his defense, which, in substance, was that he had been given permission to make a statement and had not intended to 'reflect disrespect for the Court,' but he also said that the testimony in the principal case 'clearly indicates that my right to justice had been transgressed by acts that the Judge condoned.'

"Defendant admitted the certification of the transcript of the proceedings before Judge Hegarty was correct but objected to it on the ground that it did not contain the transcript of the testimony of the principal case. The Court stated that it had determined that the contempt was criminal. Defendant then requested a jury trial and this was denied. No further defense being tendered by defendant, the Court determined that the defendant was guilty of criminal contempt of court. Thereupon the Court took up

the matter of sentence. The Court asked defendant why he had not retracted his remarks, and the defendant replied that it would be 'dishonest' and 'immoral' for him to do so. The prosecutor recommended a six-months' jail sentence. The Court fixed 60 days in the Hudson County jail.

"The first point of appeal is that the conviction violated the defendant's constitutional right of free speech. This contention is specious. The right of free speech is always subject to subsequently applicable sanctions for abuse of the right, see New Jersey Constitution, Art. 1, par. 6, and one of these is a contempt citation for contemptuous remarks to a judge in a courtroom. The subject is fully discussed in State v. Gussman, 34 N. J. Super. 408 (App. Div. 1955), and requires no present elaboration.

"The second contention is that the evidence does not establish guilt of criminal contempt. We disagree. To condone means to overlook or pardon voluntarily. To charge a judge with voluntarily overlooking 'perjury, thievery, collusion and contempt' of court in the making of a judicial determination is to accuse him of gross misfeasance in office. To do so in his face at a convened session of the court aggravates the calumny. And when the justification offered by the witness is that the remarks explain his refusal to answer proper questions as a witness in a proceeding before that judge, the attempt is to sustain one contempt on a foundation of the quicksand of another. This is behavior so obviously calculated to breed disrespect for the court as to clearly exemplify the rationale of the legal offense of criminal contempt as conduct tending to obstruct the administration of justice. See Offcut v. United States, 348 U. S. 11, 14 (1954); Van Sweringen v. Van Sweringen, 22 N. J. 440, 447, 448 (1956).

"The defendant next assigns the refusal of a jury trial as a denial of rights under both state and federal consti-

tutions. The unsoundness of this argument in respect to a contempt in the actual presence of the court is so well established as to require no further discussion. Green v. United States, 356 U. S. .... (1958); Van Sweringen v. Van Sweringen, supra (22 N. J., at p. 450).

"The matter of a jury trial was committed to the discretion of the trial judge. R.R. 3:8-3. The exercise of discretion in the present case is not shown to have been mistaken.

"Defendant asserts he cannot be bound by anything he said at the trial as he was not sworn as a witness, and because the conviction in effect rested on his unsworn statements, improperly used against him as a defendant. The defendant chose to appear as his own counsel, although he had counsel in court. Some of his remarks at the trial betray his sophistication with the procedural niceties involved. He will not be permitted now to disavow a position deliberately taken at the trial in the manner of an advocate. He conceded the accuracy of the transcript of his contemptuous remarks. If he had not, it could have been verified by the State. He offered no proofs on his own behalf, only argument as to the effect of his statements. It was conceded at the oral argument that he did not come to the trial prepared to offer the transcript of the principal case. He made no offer thereof, and there was no error on the part of the court in proceeding to judgment on the limited defense thus voluntarily adduced by the defendant. It would appear, moreover, that the transcript of the principal proceedings could not possibly derogate from the nature of the contempt here involved. Defendant's recourse for the asserted injustice on the merits was an appeal, not to insult the judge in open court.

"Lastly, the defendant cites the failure of the trial court to make findings of fact and to enter a formal judgment of

conviction. There were adequate findings. The court found the remarks in question were made. It determined that their character was contemptuous. We are adequately apprised by this record whether the conviction is supported by the facts and as to the court's jurisdiction. See Annot. 154 A.L.R. 1227, 1228 (1945). The rules make express requirement of a recital of the facts found in a formal signed order of contempt only in case of summary punishment for criminal contempt in the presence of the court and observed by the judge. R.R. 3:8-1. In criminal contempt proceedings generally, there is only a requirement for the entry of an order finding guilt and fixing punishment. R.R. 3:8-3. While it is preferable practice for the court to enter a formal judgment of conviction or adjudication of contempt in every contempt case, cf. R.R. 3:7-10 (d), together with appropriate findings of fact in all cases tried without a jury, so as to facilitate review, this defendant was in nowise prejudiced by the failure to enter a formal order here.

"As required by N.J.S. 2A:10-3 and R.R. 1:5-2 on an appeal of a summary conviction of criminal contempt, we express our concurrence in the adjudication of guilt of criminal contempt. Sentence will be imposed in due course."

Mr. Aaron W. Nussman argued the cause for the appellant (Messrs. Back, Nussman & Rose, attorneys).

Mr. James A. Major argued the cause for the respondent.

PER CURIAM.

The judgment is affirmed for the reasons expressed in the opinion of Judge Conford in the court below.

Appendix A (Opinions and Judgments Below)

JUDGMENT OF CONVICTION AND WARRANT OF COMMITMENT BY SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION—SEPTEMBER 17, 1958

Sidney Sarner having appealed to this court from the judgment of the Superior Court finding him guilty of a contempt of that court, criminal in nature, which judgment required him to serve a term of sixty days in the Hudson County Jail in the State of New Jersey, and the court having, pursuant to the requirements of N.J.S. 2A:10-3 and R.R. 1:5-2, examined the record and the court having from its examination of the said record determined as a matter of law and as a matter of fact that the said Sidney Sarner was in fact guilty of a contempt of the Superior Court, which contempt was criminal in its nature, and the court having expressed its views, after an examination of the law and the fact, as required by the statute and rule above cited, which views are contained in the formal decision of this court dated June 19th, 1958, which decision is incorporated herein by reference to the same extent as though copied herein at length, and the said Sidney Sarner having waived, in writing, and his personal appearance before this court on the matter of sentence, and the court being of the opinion that the said Sidney Sarner should be committed to the County Jail of the County of Hudson, for the term of sixty days;

It is, on this 17th day of September, 1958, by the Superior Court of New Jersey, Appellate Division, ADJUDGED that the said Sidney Sarner is guilty of a contempt of the Superior Court of the State of New Jersey, which contempt is criminal in nature, and the said Sidney Sarner is ordered committed to the County Jail of the County of Hudson, in the State of New Jersey, where he shall be

confined for a period of sixty days, and the keeper of the County Jail of the said County of Hudson is required to receive the said Sidney Sarner and keep him confined within the said Jail for a period of sixty days and for his so doing a copy of this judgment, marked as a true copy by the Clerk of the court, shall be sufficient commitment and warrant.

For the court

SIDNEY GOLDMANN
J. S. C.

OPINION OF SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION—JUNE 19, 1958 (NOT REPORTED)

[This opinion is embodied *verbatim* in the opinion of the Supreme Court of New Jersey at pp. 3a to 8a, *supra.*]

Appendix A (Opinions and Judgments Below)

JUDGMENT AND WARRANT OF COMMITMENT OF SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, BERGEN COUNTY—MARCH 27, 1958

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION—BERGEN COUNTY

Docket No. M 1355—55

JULIA SARNER,

Plaintiff,

vs.

SIDNEY SARNER,

Defendant.

WARRANT OF COMMITMENT
CHARGE OF CRIMINAL CONTEMPT

To the Keeper of the Common Jail of
Hudson County:

Receive into your custody the body of Sidney Sarner who is hereby committed to your Jail by order of the Court on the above charge.

For the term of Sixty Days.

I. GRANT SCOTT,
Clerk

DAVID A. NIMMO,
Judge

W. J. DEVLIN,
Clerk

Received:

Hudson County Jail,
March 27, 1958, 1:15 P. M.

Appendix B (Constitutional and Statutory Provisions)

1. New Jersey Constitution (1947).

ART. 1, PAR. 6

LIBERTY OF SPEECH AND OF THE PRESS; * * *

6. Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. * * *.

ART. 1, PAR. 9

TRIAL BY JURY; JURY OF SIX PERSONS; VERDICT IN CIVIL CAUSES; TRIAL OF MENTAL INCOMPETENCY WITHOUT JURY.

9. The right of trial by jury shall remain inviolate; but the Legislature may authorize the trial of civil causes by a jury of six persons when the matter in dispute does not exceed fifty dollars. The Legislature may provide that in any civil cause a verdict may be rendered by not less than five-sixths of the jury. The Legislature may authorize the trial of the issue of mental incompetency without a jury.

ART. 1, PAR. 10

RIGHTS OF PERSONS ACCUSED OF CRIME.

10. In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel in his defense.

Appendix B (Constitutional and Statutory Provisions)

2. Enactments of the New Jersey Legislature.

N.J.S. 2A:10-1. What Constitutes Contempt in General

The power of any court of this state to punish for contempt shall not be construed to extend to any case except the:

a. Misbehavior of any person in the actual presence of the court;

b. Misbehavior of any officer of the court in his official transactions; and

c. Disobedience or resistance by any court officer, or by any party, juror, witness or any person whatsoever to any lawful writ, process, judgment, order, or command of the court.

Nothing contained in this section shall be deemed to affect the inherent jurisdiction of the superior court to punish for contempt.

N.J.S. 2A:10-3. Review of Convictions for Contempt in Certain Inferior Courts

Every summary conviction and judgment, by the superior court in the law division or chancery division or by a county court or any inferior court, for a contempt, shall be reviewable, both upon the law and the facts, by the appellate division of the superior court. The appellate division shall give such judgment as it shall deem to be lawful and just under all the circumstances of the case and shall enforce the same as it shall order.

3. Enactments (Having Statutory Force and Effect) of the Supreme Court of New Jersey ("Revision of the Rules Governing the Courts of the State of New Jersey (1953)").

[R.R.] 1:5-2. Review of Convictions for Contempt

Every summary conviction and judgment of a trial court for a contempt shall be reviewable upon appeal both upon the law and the facts. The appellate court shall give such judgment as it shall deem to be lawful and just under all the circumstances of the case and shall enforce the same as it shall order.

[R.R.] 2:5. Scope of Review; Original Jurisdiction: Applicability of Certain Supreme Court Rules

The provisions of the following rules shall apply to appeals taken to this court [the Appellate Division]:

* * * * *

1:5-2. Review of Convictions for Contempt

* * * * *

[R.R.] 3:1-1. Scope

These rules govern the practice and procedure in the Superior Court and county courts in all criminal proceedings and, insofar as they are applicable, the practice and procedure on indictable offenses in all other courts except the juvenile and domestic relations courts.

Appendix B (Constitutional and Statutory Provisions)

Chapter VIII
CRIMINAL CONTEMPT

[R.R.] 3:8-1. *Summary Disposition.*

A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

[R.R.] 3:8-2. *Disposition. Notice and Hearing.*

(a) A criminal contempt, except as provided in Rule 3:8-1, shall be prosecuted on notice, and if it occurs in a cause it shall be prosecuted in the cause in which it occurs. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the contempt charged. The notice may be given orally by the judge in open court in the presence of the person charged with contempt or by an order to show cause or an order of arrest.

(b) If the person charged with contempt gives to the clerk of the court in which the contempt is being prosecuted a good and sufficient bond or cash deposit in lieu thereof for his appearance at the hearing, approved by any judge of the Superior Court or county court except one who may be otherwise disqualified, he shall be admitted to bail pending the hearing.

(c) The court may designate as prosecutor of the proceedings, the Attorney General, the county prosecutor, or any other attorney or counsellor of this state appointed by the court for that purpose.

(d) If the contempt charged involves disrepect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the consent of the person charged with contempt. If the substance of the charge is a violation of an order or judgment of the court, the judge who made the order or judgment is likewise disqualified.

(e) Where an order to show cause is made, the person charged with contempt may, not later than 1 day before the return day of the order, or within such time as the court may allow, serve an answer or an answering affidavit, or he may plead orally at the hearing. The procedure by attachment is superseded, and interrogatories are not required.

[R.R.] 3:8-3. TRIAL; JUDGMENT.

The court in its discretion may try the issue without a jury, but this rule shall not supersede any statutory right to trial by jury. Upon a finding of guilt in a criminal contempt proceeding, the court shall enter an order fixing the punishment.

[R.R.] 4:1-1. SCOPE OF RULES.

The rules in Part IV govern the practice and procedure in the Superior Court in all actions of a civil nature, whether cognizable as cases at law, in equity or otherwise.

RULE 4:87. CONTEMPT

[R.R.] 4:87-1. *Contempt in the Presence of the Court.*

A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual

presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

[R.R.] 4:87-2. *Proceedings Upon Notice.*

Every other contempt, whether of a criminal or civil nature, shall be prosecuted on notice, and if it occurs in an action, it shall be prosecuted in the action in which it occurs. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense and shall state the essential facts constituting the contempt charged. Whether the contempt charged is criminal or civil in nature, the notice may be given by an order to show cause; and the person charged with contempt may, not later than 1 day before the return day of such an order, or within such time as the court may allow, serve an answer or an answering affidavit, or he may plead orally at the hearing. In any cause in which the court determines that the contempt charged may be criminal in nature—

(a) The notice may be given orally by the judge in open court in the presence of a person charged with contempt or by an order of arrest, or, as stated, by an order to show cause.

(b) If the person charged with contempt gives to the clerk of the court a good and sufficient bond for his appearance at the hearing, approved by any one of the judges of the Appellate Division, he shall be admitted to bail pending the hearing.

(c) The court may designate as prosecutor of the proceeding, the Attorney General, the county prosecutor or any other attorney of this State.

(d) If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the consent of the person charged with contempt.

(e) If the substance of the charge is a violation of an order or judgment of the court, the judge who made the order or judgment is likewise disqualified, except that proceedings charging contempt of an order issued in aid of judgment or execution may be heard by the judge who made such order.

The procedure by attachment may be invoked in the case of witnesses or persons not parties to the action, but it is superseded in the case of parties. Interrogatories are not required.

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Office-Supreme Court, U.S.
FILED
APR 25 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 803

IN THE MATTER

of

SIDNEY SARNER,
Charged With Criminal Contempt,

Appellant.

ON APPEAL FROM THE SUPREME COURT
OF NEW JERSEY

MOTION TO DISMISS APPEAL AND IN THE ALTERNATIVE TO AFFIRM FINAL JUDGMENT

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Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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Statement of Question Involved

1. May this Court note probable jurisdiction on an appeal from a State Supreme Court when the record shows that there was no substantial federal question before the state courts?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No.

IN THE MATTER

of

SIDNEY SARNER,

Appellant.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION TO DISMISS APPEAL AND IN THE ALTERNATIVE TO AFFIRM FINAL JUDGMENT

Pursuant to Rule 16(1) of the Revised Rules of this Court, David D. Furman, Attorney General of New Jersey, moves that this appeal be dismissed on the grounds that there is want of a substantial federal question properly advanced or expressly passed upon in the state courts or, in the alternative, that the final judgment be affirmed on the ground that the questions presented by this appeal are so insubstantial as not to warrant further review by this Court.

Statement of the Case

This is an appeal from a judgment of the Supreme Court of New Jersey rendered January 5, 1959, printed in Appendix A of the jurisdictional statement and reported at 28 N. J. 519; 147 A. 2d 244. This judgment affirmed, on the opinion below, a judgment of the Superior Court, Appellate Division which in turn had affirmed a judgment of conviction of the appellant in the Superior Court, Chancery Division, for criminal contempt of court pursuant to N.J.S. 2A:10-1 and *Revised Rules of the New Jersey Courts* (1953), 4:87-1 (hereinafter cited as R.R.).

The undisputed facts giving rise to the contempt proceeding are as follows: The appellant's wife had instituted a matrimonial action in the Superior Court, Chancery Division. On November 7, 1957, Judge WILLIAM A. HEGARTY of the Chancery Division found that judgment for separate maintenance should be entered for the wife. On December 3, 1957, a hearing was held before Judge HEGARTY to ascertain if the appellant were able to pay alimony and counsel fees. At the hearing the appellant, evidently upset at the determination awarding separate maintenance, requested permission to address the court. Although Judge HEGARTY denied the request and said "You may sit down" to the appellant (Appendix of the Appellant in the Appellate Division, 6a-35 to 7a-5) (hereinafter cited as "Apx") the following colloquy ensued (Apx 7a-10 to 8a-25):

> The Witness: [Sidney Sarner, the appellant] "You have condoned in this Court perjury, thievery, collusion and contempt for this Court, but not only it becomes my duty to sustain the truth and to oppose such justice but to expose it. Therefore, you may if you wish, I will not further testify under the jurisdiction of this Court. You may by your inclination on my

behalf do as you see fit. I will not testify any further.

Mr. Brown: Would you retain your seat, Mr. Sarner, please. If your Honor please, at this time, I can only say that Mr. Sarner has expressed his view here, and I think your Honor has full cognizance of the impact of this matter and of its import and of its history completely. There is very little that I can say at this time. I think this man, with respect I have thought, demonstrated to this Court, I think your Honor too has observed, his forthrightedness, tendency to cooperate completely with the Court and at this time I can only say that he expresses himself as he indicated he felt. But I do know your Honer is understanding this situation and I am sure you will consider it.

The Court: I will duly consider it at the appropriate time. All right, you may proceed.

Mr. Losche: Now, this contempt has occurred in the face of the Court.

The Court: That is right.

Mr. Losche: I ask the Court to commit the witness immediately.

Mr. Brown: I say to you there has been no contempt in the face of the Court. There is nothing before the Court at this time. There has been an expression that I submit you your Honor has to be submitted in the light that this is a Court of Equity.

The Witness: May I say this by reason of what I voiced. I am in contempt on such justice and will stand in contempt of such justice. By such reason I have a right, and not only a right but a duty to do so. On this basis I will defend myself in contempt. First, before we continue, I am not in contempt of the Court. I am in contempt of the abomination of the justice there. That is what I am in contempt of.

The Court: There will be no speech making. You

asked permission to make the statement. You were granted that right. In due time I will consider what will be done in connection with what you have said. You may proceed with your examination.

The Witness: I will stand on my right not to be maligned and further procedure in this case until my points are proven true or false. These have been made here. There was not one iota of proof before your Honor by their own witnesses that showed I abandoned."

The appellant then refused to respond to certain questions asked him which follow (Apx 8a-35 to 42):

"Q. Mr. Sarner, what is your business? A. I have made my decision before what I intend to do. This I will stand by.

The Court: You may answer the question.

The Witness: I answered it. I advised the Court what I intended to do and I stand by it."

As a result of these remarks counsel for the appellant's wife moved that the court summarily commit the appellant for contempt (Apx 7a-18 to 38). No disposition was made of this suggestion by the trial court at that time. When the matrimonial hearing was continued the following day, December 4, 1957, Judge HEGARTY announced that the contempt charge would be disposed of on December 5, 1957 (Apx 34a-10 to 13). While the record does not disclose why the contempt proceeding did not commence on the next day, it was in fact adjourned until Judge HEGARTY on March 6, 1958, certified to the assignment judge of Bergen County that the appellant had committed a contempt before him (Apx 2a-4a). This action was in obedience to R.R. 4:87-2(d) which disqualifies a trial judge from presiding at hearings on charges of contempt arising from

disrespect or criticism of himself. On March 10, 1958, Superior Court Judge J. WALLACE LEYDEN issued an order for the appellant to show cause on March 27, 1958 why he should not be adjudged guilty of contempt (Apx 1a).

On March 27, 1958 the matter was assigned to and scheduled for hearing before Superior Court Judge DAVID A. NIMMO (Apx 11a to 24a). A transcript of the hearing at which the alleged contempt had been committed was made part of the record before Judge NIMMO. The appellant in open court before Judge NIMMO conceded its accuracy (Apx 18a-12 to 19a-21). Though no further evidence was offered either in support of or against the charge of contempt, the appellant demanded a jury trial (Apx 20a-29). While Judge NIMMO had discretion to honor this request he refused to do so because in view of the admission concerning the accuracy of the transcript there were no questions of fact to be resolved (R.R. 4:87-3; Apx 20a-30 to 40). Judge NIMMO thereupon found the appellant guilty and sentenced him to 60 days in the Hudson County Jail (Apx 25a).

The action by the trial court in the contempt proceeding was in accord with the general New Jersey rule that "[w]here in the trial of an action there were no disputed facts or disputed inferences to be drawn from the undisputed facts, it devolves upon the court to declare the judgment which the law imposes." *Kaufman* v. *Pennsylvania R.R. Co.*, 2 N. J. 318, 324, 66 A. 2d 527, 529 (1949); *Ferdinand* v. *Agricultural Ins. Co.*, 22 N. J. 482, 126 A. 2d 323 (1956); *Genovay* v. *Fox*, 29 N. J. 436, 149 A. 2d 212 (1959). In criminal cases the determination of whether a given set of facts constitutes a crime is similarly for the court. Thus in *State* v. *Schneiderman*, 20 N. J. 422, 120 A. 2d 89 (1956) it was held proper for a trial judge to charge the jury that

if the defendant maintained a contrivance operable in a given manner it was a gambling machine.

Appeals to the Appellate Division and the Supreme Court resulted in affirmance of the action of the Chancery Division, 28 N. J. 519, 147 A. 2d 244. The opinion of the Appellate Division adopted by the Supreme Court held that the trial court had not abused its discretion in denying a jury trial. Following the appeal to this Court, James A. Major, Esq., who had theretofore prosecuted the action on behalf of the State asked for and received permission to withdraw from the case. The Attorney General was then designated by the Supreme Court of New Jersey as attorney to defend this appeal (Appendix A attached hereto) pursuant to R.R. 4:87-2(c) which provides:

> "(c) The court may designate as prosecutor of the proceeding, the Attorney General, the county prosecutor or any other attorney of this State."

ARGUMENT

POINT I

The appellant fails to present a substantial federal question which may be reviewed by this Court.

The appellant urges four bases on which this Court may note jurisdiction. He claims that the fourteenth amendment to the United States Constitution was infringed because (a) of the allegedly inadequate notice given him, (b) the denial of a trial by jury, (c) the "summary" procedure in the Chancery Division of the Superior Court, and (d) the restriction of his freedom of speech.

None of these contentions was timely advanced in the New Jersey courts and thus the appeal should be dismissed. One of the fundamental jurisdictional principles of this

Court is that it will not consider constitutional points not properly presented below. *Edelman* v. *California*, 344 U. S. 357, 73 S Ct. 293, 97 L. Ed. 387 (1953); *Shelley* v. *Kraemer*, 334 U. S. 1, 8-9, 68 S. Ct. 836, 839-40, 92 L. Ed. 1161 (1948); *Corrigan* v. *Buckley*, 271 U. S. 323, 46 S. Ct. 521, 70 L. Ed. 969 (1926); *Matheson* v. *Branch Bank of Alabama*, 48 U. S. (7 How.) 260, 12 L. Ed. 692 (1849).

The question of inadequacy of notice was never raised in the trial or appellate courts of New Jersey and is being advanced for the first time here. Even if the appellant prior to the contempt hearing had been confused as to whether the proceeding against him would be criminal or civil in nature he was directly told of its criminal nature at the hearing. Upon being so advised he did not seek an adjournment nor did he claim that his alleged misunderstanding affected the validity of the proceedings (Apx 17a-30 to 40). Thus he made no effort to preserve his position in this regard and on the prior appeals the point was never considered by the Appellate Division or Supreme Court of New Jersey. The appellant in the Chancery Division though claiming a "constitutional right" to a jury trial never specified whether this "right" was derived from the federal or state constitution (Apx 18a-3 to 11). On appeal the Supreme Court and Appellate Division entertained the argument that the federal constitution had been infringed by the denial but disposed of it as being unsound and not worthy of consideration, 28 N. J. at 524, 147 A. 2d at 247. In doing so, the New Jersey Supreme Court relied on the decision of this Court in *Green* v. *United States*, see Point II, *infra*.

In no other manner did the appellant complain of the otherwise "summary" nature of the proceeding to the Chancery Division. While this point was raised on appeal, the Supreme Court refused to pass upon it pursuant to its

usual policy of declining to entertain constitutional positions not taken in the trial courts. See *Lettieri* v. *State Bd. of Medical Examiners*, 24 N. J. 199, 131 A. 2d 518 (1957); *Brogan* v. *Passaic Daily News*, 22 N. J. 139, 123 A. 2d 473 (1956).

The claim of infringement of the right to free speech as secured by the fourteenth amendment was never advanced in the Chancery Division. Though argued on appeal in the New Jersey appellate courts the issue cannot be deemed properly preserved inasmuch as the opinion of the Appellate Division, adopted by the Supreme Court, considered this contention under the state but not the federal constitution, 28 N. J. at 523, 147 A. 2d at 246.

In any event, each of these claims is reviewed and rebutted in Point II, *infra*, as being specious and without any merit.

POINT II

The federal questions raised on this appeal are insubstantial.

The record shows that the federal questions raised in this case are frivolous. At every state of the proceedings in the New Jersey courts the appellant had adequate constitutional protections and was treated with fundamental fairness. He certainly had adequate notice of his hearing. On December 4, 1957 during the matrimonial action Judge HEGARTY told him that he would be tried for contempt (Apx 34a-11 to 13). On March 6, 1958, Judge HEGARTY certified that the appellant had been guilty of contempt. (Apx 2a to 4a). An order to show cause why he should not be adjudged guilty of contempt issued to the appellant on March 10, 1958, returnable 17 days later on March 27, 1958. (Apx 1a). This notice can hardly be deemed too short. See *Roller* v. *Holly*, 176 U. S. 398, 20 S. Ct. 410, 44 L. Ed.

520 (1900). Further no adjournment was sought nor did the appellant suggest that he had had inadequate opportunity to prepare. In any event the appeal in the Appellate Division and the Supreme Court was heard *de novo*, both as to the law and as to the facts. 28 N. J. at 525 147 A. 2d at 247. Though both appeals were tried on the record had the appellant desired to introduce new evidence he could have sought leave to do so since the New Jersey Constitution gives the Appellate Division and the Supreme Court such original jurisdiction as is necessary to dispose of any case before it, *New Jersey Constitution of 1947*, Art. VI, §5, par. 3; *State* v. *Ferrell*, 29 N. J. Super. 183, 102 A. 2d 70 (App. Div. 1954); see *Coleman* v. *Newark Morning Ledger Co.*, 29 N. J. 357, 149 A. 2d 193 (1959). Further as was noted in Point I, *supra*, there was no question of fact to be resolved. While this Court has emphasized that unfair procedural rulings may not be invoked to preclude presentation of *facts*, as distinguished from questions of law, *cf. F. C. C.* v. *WJR*, 337 U. S. 265, 69 S. Ct. 1097, 93 L. Ed. 1353 (1949), the appellant had every opportunity, in any event, to prepare for his defense, including the legal arguments he intended to advance The Supreme Court of New Jersey recently reviewed this question of an opportunity to be heard on questions of law as it related to problems of procedural fairness. In *Arthur Venneri Co.* v. *Housing Authority of City of Paterson*, 29 N. J. 392, 149 A. 2d 228, decided March 10, 1959, the low bidder on a public contract appealed the action of the public authority refusing to award it the contract and denying it a hearing to determine if it were responsible. The reason for the administrative action had been that the contract was to be partially financed with federal funds and the contractor had been disqualified under federal law from bidding on any such contract because of an attempt to bribe a federal officer. The Supreme Court of New Jersey held that inas-

much as the only question involved was of law the denial of a hearing before the agency was without significance since on appeal the Supreme Court could ascertain the law for itself.

The contention that a jury trial is required by the fourteenth amendment for a hearing on a charge of criminal contempt before a state court is contrary to all precedent. *Eilenbecker* v. *District Ct.*, 134 U. S. 31, 10 S. Ct. 424, 33 L. Ed. 801 (1890); *Fisher* v. *Pace*, 336 U. S. 155, 69 S. Ct. 425, 93 L. Ed. 569 (1949); see *Green* v. *United States*, 356 U. S. 165, 183 n. 14, 78 S. Ct. 632, 643 n. 14, 2 L. Ed. 2d 672 (1958). *Eilenbecker* v. *District Ct.* was in this Court on a writ of error from the Supreme Court of Iowa which had affirmed the convictions of the plaintiffs in error for criminal contempt in violating injunctions restraining them from selling alcoholic beverages. The plaintiffs in error had been fined $500 and costs and had been sentenced to three months in jail, such prison term to abate, however, if the fines were paid within thirty days. This Court squarely held that such a sentence could be imposed by the court without a jury trial and that the fourteenth amendment was never "* * * intended to interfere with or abolish the powers of the courts in proceedings for contempt, whether this contempt occurred in the course of a criminal proceeding or a civil suit" 134 U. S. at 39, 10 S. Ct. at 427. There is nothing in the record which would justify a retreat from the frequently reaffirmed *Eilenbecker* rule. It is clear enough that if the federal constitution does not require a jury trial in the federal courts for criminal contempts there committed, *Green* v. *United States, supra,* that the fourteenth amendment would not place a greater burden on the states. *Cf. Wolf* v. *Colorado,* 338 U. S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949).

The appellant's position that the proceeding below was summary is not supported in the record. A summary dis-

position of a contempt of court means an adjudication by the judge before whom the contempt was committed with the defendant being denied an opportunity to be heard. Compare *Sacher* v. *United States*, 343 U. S. 1, 72 S. Ct. 451, 96 L. Ed. 717 (1952) and *Brown* v. *United States*, 356 U. S. 148, 78 S, Ct. 622, 2 L. Ed. 2d 589 (1958) with *Green* v. *United States, supra*. In view of the facts that the proceeding below was on notice through an order to show cause and the appellant had an opportunity to present witnesses and argue the law the hearing was plenary in the constitutional sense. In any event, inasmuch as the contempt was committed in the face of the court, summary adjudication would have been consistent with the federal constitutional guarantee of due process of law. In *Brown* v. *United States* this Court held that a witness before a federal district court who wrongfully refuses to answer questions has committed a contempt within the presence of the court and may be summarily adjudicated to be in criminal contempt.

Finally, the suggestion that a witness has a federal right originating in the protection of free speech to deliver an unsolicited attack upon the integrity of the trial judge, *Fisher* v. *Pace*, 336 U. S. 155, 163, 69 S. Ct. 425, 428-29, 93 L. Ed. 569 (1949), or to refuse to answer questions may not be accepted. *Brown* v. *United States, supra*. In *Fisher* v. *Pace* this Court was faced with a decision affirming a contempt conviction of an attorney who refused to abide by a ruling of a trial judge and engaged in an altercation with the judge. The Court held:

> "We cannot say, however, that mildly provocative language from the bench put a constitutional protection around an attorney so as to allow him to show the contempt for judge and court manifested by this record, particularly the last few sentences of the altercation." 336 U. S. at 163, 69 S. Ct. 428-29.

And *Brown* v. *United States* affirmed a contempt conviction of a witness who had unjustifiably refused to answer questions.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this appeal should be dismissed or in the alternative the judgment of the Supreme Court of New Jersey should be affirmed.

Respectfully submitted,

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Deputy Attorney General,
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On the Brief.

APPENDIX A

OFFICE OF THE CLERK
SUPREME COURT OF NEW JERSEY
STATE HOUSE ANNEX
TRENTON, N. J.

JOHN H. GILDEA
CLERK

March 4, 1959

David M. Satz, Jr., Assistant Attorney General
State House Annex
Trenton, New Jersey

Re Sarner vs. Sarner

Dear Mr. Satz:

In this matter Mr. James A. Major has appeared throughout at the request of the Superior Court. On the appeal to the United States Supreme Court Mr. Major has asked to be relieved and the Supreme Court requests that the Attorney General appear on behalf of the respondent in the United States Supreme Court.

Very truly yours,

/s/ JOHN H. GILDEA

LE COPY

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MAY 18 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 803

IN THE MATTER

of

SIDNEY SARNER,
Charged With Criminal Contempt,

Appellant.

ON APPEAL FROM THE SUPREME COURT
OF NEW JERSEY

REPLY BRIEF FOR APPELLANT (IN OPPOSITION TO MOTION TO DISMISS APPEAL, ETC.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 803

IN THE MATTER

of

SIDNEY SARNER,
Charged With Criminal Contempt,

Appellant.

REPLY BRIEF FOR APPELLANT (IN OPPOSITION TO MOTION TO DISMISS APPEAL, ETC.)

I.

The motion of the Attorney General of New Jersey is brought in the alternative to affirm the judgment below, purportedly pursuant to Rule 16.1 of the Rules of this Court. It is submitted that the latter Rule does not contemplate a motion to affirm a *state court* judgment sought to be reviewed on appeal, but contemplates only a motion to dismiss such appeal.

II.

The motion contains factual errors which, if not corrected, would severely prejudice the consideration of the question of jurisdiction and, ultimately, of the merits.

First, the motion erroneously states (p. 2) that when the appellant "requested permission to address the court * * * Judge HEGARTY denied the request * * *." However, in the next pages of the motion (pp. 3-4), Judge HEGARTY is quoted as saying, "* * * you asked permission to make the statement. You were granted that right * * *." See App. S. Ct. N. J. 6a, lines 36 to 38; *Id.*, 8a, lines 20 to 22.

Second, the Attorney General, in one place in his motion (p. 4) by factual implication, and in two other places therein (p. 11) by argumentative suggestion, repeats certain factual errors committed by the Supreme Court of New Jersey and the Appellate Division to the effect that (1) the appellant's refusal to answer questions before Judge HEGARTY caused an interruption of the matrimonial trial proceedings lasting until the following day, and (2) that the appellant was or may have been charged, tried and convicted for such refusal. We showed in our Jurisdictional Statement (p. 7, at fn. 2) that the interruption occasioned by the refusal lasted only for the duration of a *short recess* of the proceedings, and ended with the appellant's retraction of his refusal and with his resumption of testimony immediately following that short recess, all of which occurred on the same day (December 3, 1957), so that the refusal was but momentary. That short recess, moreover, was the direct result of a suggestion made by Judge HEGARTY himself that the appellant "maybe * * * should * * * consult with your counsel now" App. S. Ct. N. J. 9a, lines 5 to 6. Furthermore, the order to show cause of Judge LEYDEN citing the appellant for contempt referred only to "statements involving disrespect to and criticism of the judge then sitting in the cause", making no mention of the momentary and promptly retracted refusal to testify. App. S. Ct. N. J. 1a. Likewise the certification of Judge HEGARTY charged only "abusive and defamatory language" (*Id.* 2a), facts as to the refusal to testify being found in the

certification only in the quoted transcript matter embodied therein and annexed thereto. *Id.* 2a to 3a, 7a to 8a. In the contempt proceeding (before Judge NIMMO) (*Id.* 11a to 24a) the appellant called attention to the fact that he had retracted his refusal to testify (*Id.* 14a, lines 38 to 39), and there the matter was left, neither Judge NIMMO nor the prosecutor making any further reference to it. Notwithstanding all this, the Attorney General of New Jersey is depicting the case to this Court as involving a contumaciously significant refusal to testify. And in this respect, as mentioned, the Attorney General is repeating the factual errors of the Supreme Court of New Jersey and the Appellate Division. (The language embodying the erroneous assumption of those courts that the interruption occasioned by the refusal to testify persisted into the following day appears in Appendix A of our Jurisdictional Statement, p. 5a. The language showing the decisional reliance by those courts on the factor of refusal to testify appears in *Id.*, p. 6a. See also our Jurisdictional Statement, p. 7.)

The true factual setting of this contempt case, then, is simply one of speech—spoken words criticizing a judge. This speech did not result in any significant obstruction or disturbance of the orderly progress of the proceedings. The Attorney General's above-noted erroneous statements or intimations that the appellant spoke his words in contumacious defiance of a court order to remain silent, and that in addition the case is one of contumacious refusal to testify, are in the face of the unmistakable record facts referred to above. In short, the nature of the alleged contempt is such as to give rise to an issue of abridgment of First Amendment-Fourth Amendment rights of free speech, and this issue should not be obscured by unfounded suggestions that overt acts of obstruction or defiance to authority are involved in the case.

Furthermore, the groundless attempt to depict the case as involving such overt conduct of obstruction of judicial proceedings and defiance to court authority, conduct which is supposed to have occurred moreover in *facie curiae*, should not be permitted to obscure the other important constitutional issues in the case, namely, the due process issues arising from the summariness with which the appellant was "tried" for his allegedly contemptuous criticism of the judge. For appellant's case might well be deemed less constitutionally sympathetic as respects issues of procedural due process if he had in fact been guilty of outright acts of obstruction and defiance in *facie curiae* which might have necessitated and justified procedural shortcuts. Cf. *Ex Parte Hudgings*, 249 U. S. 378, 383; *Cooke* v. *United States*, 267 U. S. 517, 536; and authorities cited in our Jurisdictional Statement, p. 22, fn. 10.

On the other hand, if the Attorney General is correct in importing into the case the supposed charges of overt obstruction and defiance, there would be presented new issues of serious due process aggrievement, in that it is indisputable that the appellant did not receive adequate notice and hearing of any such charges. Cf. *Cooke* v. *United States*, 266 U. S. 517, 536-539; *State* v. *Chaffman*, 15 N. J. Super. 492, 497-498 (App. Div. 1951); *State* v. *Thornton*, 137 W. Va. 230, 238-239, 72 S. E. 2d 203, 207-208 (1952).

This Court may, of course, examine the record to determine for itself the relevant constitutional facts on the issues of whether the appellant addressed the court after denial of permission to do so, whether his refusal to testify was other than momentary and promptly retracted, and whether he was charged, tried and convicted (constitutionally or otherwise) with respect to any such alleged conduct. *Fay* v. *New York*, 332 U. S. 261, 272; *Craig* v. *Harney*, 331 U. S. 367, 373-374; *Carlson* v. *Curtiss*, 234 U. S. 103, 106. Cf. *Fisher* v. *Pace*, 336 U. S. 155, 160.

III.

The motion (p. 5) incorrectly states that in the contempt proceedings the appellant conceded the accuracy of the transcript of his allegedly contemptuous remarks to Judge HEGARTY; and that except for the latter transcript "no further evidence was offered either in support or against the charge of contempt." We showed in our Jurisdictional Statement (p. 11, item [14]) that the appellant did not concede the accuracy of the transcript; that the prosecutor did introduce additional evidence (to the effect that appellant had said his remarks were "not spontaneous"); and that the appellant objected to this additional evidence and vainly sought the right to introduce evidence in explanation or defense, viz, his proffered proofs that perjury, etc. had in fact occurred in the matrimonial proceeding (Jurisdictional Statement, pp. 11-12, items [14], [15], [16], [17]; see also *Id.*, p. 6, for the references to the record in the matrimonial proceeding as to the perjury, etc. believed by the appellant to have occurred).

Our insistence that the appellant did not concede the accuracy of the transcript is deemed by us crucial, not because we would challenge that accuracy if given an opportunity to do so, but beause this matter of the appellant's having conceded *vel non* the accuracy of the transcript, forms a decisive link in the chain of our procedural due process argument in this case. For, we contend that the "summary" contempt powers of New Jersey's R.R. 3:8 were so restrictively applied to the appellant as to deprive him of any opportunity to defend on the issues of justification and criminal intent; and that, when the appellant perceived that he was not going to be afforded an opportunity, by jury trial *or otherwise* (Jurisdictional Statement, pp. 11-12), to introduce proofs justifying his charges of perjury, etc., he drew back from submitting himself to be

"tried" on the basis of the contempt transcript standing alone. In other words, appellant's stand against conceding the accuracy of the transcript was *part of his stand against making any waiver*[1] of his constitutional right to an adequate trial of the issue of his criminal guilt.

The Attorney General's erroneous contentions that the appellant conceded the accuracy of the transcript and that no other evidence was offered by either side in the contempt proceeding are made for the purpose of portraying the case as one in which, supposedly, no issue need arise of denial of jury trial because there was nothing for a jury to try. This argument is explicitly advanced at pp. 5-6 of the motion. The argument runs: the accuracy of the transcript was admitted, the transcript shows criminal contempt on its face, hence the making of the adjudication of contempt was merely a matter of law for the court. This entire line of argument stands or falls on the question of the correctness of a very important assumption of law that the Attorney General is making, namely, that in the circumstances of this case of criminal contempt the alleged contemnor had no federal constitutional right to be heard (by a jury or otherwise) on the issues of motive, intent, justification or good faith. This assumption of law is manifestly wrong.

To begin with, it is to be remembered that the appellant was not punished *instanter* as for direct contempt in *facie curiae*, but was tried under an at least ostensible notice-and-hearing procedure, and by a judge who had not personally observed the alleged contempt and had no direct personal knowledge thereof or of the matrimonial proceeding in which it arose. This being so, the appellant be-

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[1] Cf. *Staley* v. *South Jersey Realty Co.*, 83 N. J. Eq. 300, 307, 308 (E. & A. 1914); *Passaic-Athenia Bus Co.* v. *Consolidated Bus Co.*, 100 N. J. Eq. 188, 190-192 (Ch. 1926).

came entitled to the constitutional protections accorded to persons tried as for indirect or constructive criminal contempt. The case in this respect is virtually if not perfectly on all fours with *Offutt* v. *United States*, 232 F. 2d 69 (C. A. D. C. 1956), cert. den. 351 U. S. 988. Cf. the procedure employed in the contempt trial involved in *Ex Parte Bradley*, 7 Wall. 364, 373. Cf. also *Schmidt* v. *United States*, 115 F. 2d 394, 398 (C. C. A. 6, 1940) (alleged violation of grand jury secrecy by interviewing grand jurors and filing affidavits based thereon; conviction reversed because case tried by a judge against whom affidavits of bias and prejudice were pending; remanded for new trial by a different judge with instructions to decide issues of "contemptuous motive and wilful and intentional disrespect of the court. Such decision is required as a prerequisite to a proper determination of the penalty to be imposed. *Cooke* v. *United States*, *supra*, 267 U. S. page 537 * * *."). That the intrusion into a contempt trial of matters not within the judge's personal knowledge requires treating the case as one of indirect or constructive contempt even where the judge is the same one who observed the allegedly contemptuous happenings was squarely held in *People* v. *Gerrard*, 15 Ill. App. 2d 301, 146 N. E. 2d 229 (1957). Cf. *People* v. *Loughran*, 2 Ill. 2d 258, 118 N. E. 2d 310 (1954); *Ex Parte Wisdom*, 233 Miss. 865, 79 So. 2d 523 (1955). See also the authorities cited in our Jurisdictional Statement, p. 22, fn. 11.

With the apparently sole exception of jury trial[2]—which we are seeking in this case by inviting the Court to reconsider *Eilenbecker* v. *District Court*, 134 U. S. 31 (Juris-

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[2] *Ex Parte Grossman*, 267 U. S. 87, 117-118, 122, speaks undefinedly of the non-applicability of some provisions of the bill of rights in criminal contempt trials, but the reference appears to look to nothing more than the jury trial point, and possibly to cases of literally summary punishment of direct contempts.

dictional Statement, pp. 20-25) —a trial of constructive criminal contempt is for all practical purposes tantamount to the trial of crime. *Gompers* v. *United States*, 233 U. S. 604, 610-611; *Michaelson* v. *United States*, 266 U. S. 42, 66, 67; *Cammer* v. *United States*, 350 U. S. 399, 403; *Green* v. *United States*, 356 U. S. 165, 179; *In re Jibb*, 123 N. J. Eq. 251 (E. & A. 1938); *Swanson* v. *Swanson*, 10 N. J. Super. 513, 520 (App. Div. 1950), affirmed 8 N. J. 169 (1951); *In re Verdon*, 91 N. J. L. 491, 495-496 (S. Ct. 1918). Defendants in such contempt trials are presumed innocent, and their guilt must be proved beyond a reasonable doubt. See authorities collected in *Nilva* v. *United States*, 352 U. S. 385, 399 n. 3 (dissenting op.); see also the New Jersey cases last cited, and *Zimmerman* v. *Zimmerman*, 12 N. J. Super. 61, 69-70 (App. Div. 1950).

Of more specific concern in the present case, however, is the question of the ambit of defenses allowed or required to be allowed in criminal contempt trials. The Attorney General's motion has focussed the case upon this topic, through the contention that there was no issue to be tried by a jury once the transcript of the allegedly contemptuous remarks had been put in evidence and proved or admitted. As we have found no systematic treatment of this important and interesting topic (as to the range of defenses in criminal contempt), and as our case, we realize, may well turn on our ability to show to this Court that the particular defenses which the appellant unavailingly endeavored to assert in the contempt proceeding were assertible as a matter of federal constitutional right (and were of a type appropriate for consideration by a jury), we shall treat the topic mentioned in some detail, albeit necessarily not exhaustively, hopeful that we may have the opportunity to treat it more fully in a presentation on the merits:

1. The general ambit of defenses in a trial for criminal contempt is apparently not discernibly different from that in prosecutions for crime. E.g., *Cooke* v. *United States*, 267 U. S. 517, 536-539; *State* v. *Zarafu*, 35 N. J. Super. 177, 183 (App. Div. 1955); *Long* v. *McMillan*, 226 S. C. 596, 608, 86 S. E. 2d 477, 482 (1955) ("the same inalienable right to be heard in his defense as he would against a charge of murder or any other crime"); *Bowdon* v. *Bowdon*, 198 Tenn. 143, 147, 278 S. W. 2d 670, 672 (1955) ("should admit of no technical rulings against the accused but the freest opportunity should always be given him to produce his defense"); *Woodbury* v. *Commonwealth*, 295 Mass. 316, 323, 3 N. E. 2d 779, 784 (1936) (" 'In general the proceedings leading up to the punishment should be in accordance with the principles which govern the practice in criminal cases.' ").

2. The right of a defendant in a trial for criminal contempt to assert his defenses is founded in constitutional due process. *Cooke* v. *United States*, *supra*. Cf. *United States* v. *United Mine Workers*, 330 U. S. 258, 363-376 (dissenting Op.). See also, e.g., *United States* v. *P. & W. Coat Co.*, 52 F. Supp. 792, 794 (E. D. N. Y. 1943); *State* v. *Zarafu*, 35 N. J. Super. 177, 183 (App. Div. 1955); *Ex Parte Collins*, 329 Mich. 192, 196-197, 45 N. W. 2d 31, 33 (1950); *Krmpotich* v. *Krmpotich*, 227 Minn. 567, 569, 35 N. W. 2d 810, 811 (1949); *Cannon* v. *State*, 58 Okla. Cr. R. 451, 55 P. 2d 135 (1936); *Collins* v. *Superior Court*, 145 Cal. App. 2d 588, 594, 302 P. 2d 805, 809 (1956); *Ex Parte Wisdom*, 223 Miss. 865, 79 So. 2d 523 (1955).

3. Specifically, the defense of lack of criminal intent, together with related defenses as to motive, good faith, justification, truth, and the like, and, in general, full right to make "defense or explanation", are accorded to defendants in criminal contempt trials. The leading case is *Cooke* v. *United States*, 267 U. S. 517, 536-539. Also see, e.g.,

In re Chiles, 22 Wall. 157, 169; *California Artificial Stone Pav. Co.* v. *Molitor*, 113 U. S. 609, 618; *Ex Parte Savin*, 131 U. S. 267, 278-279; *Ex Parte Cuddy*, 131 U. S. 280, 286; *Pettibone* v. *United States*, 148 U. S. 197, 206-207; *Re Watts*, 190 U. S. 1, 29-33; *Merrimack River Sav. Bk.* v. *Clay Center*, 219 U. S. 527, 536-537; *Sinclair* v. *United States*, 279 U. S. 749, 765-768; *Widger* v. *United States*, 244 F. 2d 103, 106 (C. A. 5, 1957); *United States* v. *Kroger Grocery & Baking Co.*, 163 F. 2d 168, 172-175 (C. C. A. 7, 1947); *Schmidt* v. *United States*, 115 F. 2d 394, 398 (C. C. A. 6, 1940); *In re Eskay*, 122 F. 2d 819, 822 N. 17 (C. C. A. 3, 1941); *Eustace* v. *Lynch*, 80 F. 2d 652, 656 (C. C. A. 9, 1935); *United States* v. *McGovern*, 60 F. 2d 880, 888 (C. C. A. 2, 1932); *Binkley* v. *United States*, 282 Fed. 244, 246 (C. C. A. 8, 1922); *In re Tiene*, 17 N. J. 170, 180-181 (1954); *State* v. *Zarafu*, 35 N. J. Super. 177, 183 (App. Div. 1955); *In re Singer*, 109 N. J. Eq. 103, 105 (E. & A. 1931); *In re Hand*, 89 N. J. Eq. 469, 471 (Ch. 1918); *In re Schmidt*, 88 N. J. Eq. 21, 24 (Ch. 1917); *In re Gonzales*, 88 N. J. L. 536, 544 (S. Ct. 1910); *In re Cheeseman*, 49 N. J. L. 115, 143 (S. Ct. 1886); *Thompson* v. *Pennsylvania R.R. Co.*, 48 N. J. Eq. 105, 108-109 (Ch. 1891); *In re Rotwein*, 291 N. Y. 116, 51 N. E. 2d 669 (1943); *Petition of Robert Boasberg*, 285 App. Div. 1113, 140 N. Y. S. 2d 192 (1955) same case, 286 App. Div. 951, 143 N. Y. S. 2d 272 (1955); *People* v. *Hille*, 192 Ill. App. 139 (1915); *In re Cottingham*, 66 Colo. 335, 337, 182 Pac. 2, 3 (1919); *Ex Parte Cunha*, 123 Cal. App. 625, 11 P. 2d 902, 906 (1932), reh. den. 18 P. 2d 979; *State* v. *District Court*, 58 Mont. 276, 191 Pac. 772, 776 (1920); *State* v. *Martin*, 125 Okl. 51, 256 Pac. 667 (1927); *Percival* v. *State*, 45 Neb. 741, 64 N. W. 221 (1895); *Carr* v. *District Court*, 147 Iowa 663, 126 N. W. 791 (1910); *Herald-Republican Pub. Co.* v. *Lewis*, 42 Utah 188, 129 Pac. 624 (1913).

4. Cf. the cases holding that newspapers may defend against charges of criminal contempt by showing the truth

of the writing. *McGill* v. *State*, 209 Ga. 500, 74 S. E. 2d 78 (1953); *Ex Parte Pease*, 123 Tex. Cr. R. 43, 57 S. W. 2d 575 (1933); *Post* v. *Ohio*, 7 Ohio Circuit Dec. 257, 14 Ohio Cir. Ct. R. 111 (1897). Cf. *Globe Newspaper Co.* v. *Commonwealth*, 18 Mass. 449, 74 N. E. 632 (1905) defense of truth considered in mitigation.

5. The total closing off of the appellant's opportunity to introduce his proofs as to intent, motivation, good faith and "truth", or to make "defense or explanation", was a denial of Fourteenth Amendment due process. As this denial occurred in the framework of the rigorous "summariness" generated by R.R. 3:8, an appropriate issue is presented for review within the jurisdictional provisions of 28 U. S. C. Section 1257(2).

6. A familiar "intent" defense in criminal contempt for speech or writings is that the words are susceptible of a non-contemptuous interpretation and that such was intended. *Freeman* v. *State*, 188 Ark. 1058, 69 S. W. 2d 267 (1934); *Ex Parte Biggers*, 85 Fla. 297, 95 So. 755 (1923); *La Grange* v. *State*, —— Ind. ——, 153 N. E. 2d 593 (1958); *Rosewater* v. *State*, 47 Neb. 630, 66 N. W. 640 (1896); *In re Robinson*, 117 N. C. 533, 23 S. E. 453 (1895); *Board of Supervisors of Hanover County* v. *Bazile*, 195 Va. 739, 80 S. E. 2d 566 (1954). The record herein shows the appellant repeatedly attempting to explain that he intended no contempt towards the court but felt impelled to call attention to "truth" concerning conduct of his wife and other persons in the matrimonial litigation. App. S. Ct. N. J. 8a, lines 21 to 24; *Id.*, 13a, line 10; *Id.*, 19a, lines 17 to 21; *Id.*, 20a, lines 7 to 9; *Id.*, 21a, line 39 to 22a, line 13; *Id.*, 22a, lines 16 to 28; *Id.*, 31a, line 19, to 32a, line 24. It is submitted that the appellant's allegedly contemptuous language (*Id.*, 2a to 3a) was susceptible of being interpreted in accordance with the "truth" explanation just noted, and was not intended as contempt of the

court. By denying the appellant a trial (by jury or otherwise) of this issue of intent the state courts have deprived him of substantial procedural rights in contravention of the due process clause of the Fourteenth Amendment. This deprivation was effected through the applying of the summary procedures of R.R. 3:8; thereby an appealable issue is presented within the meaning of 28 U. S. C. 1257(2).

7. The defense of lack of criminal intent assumes additional importance in the instant case because New Jersey is one of the state jurisdictions which still recognize an at least qualified right of expurgation by disavowal of contumacious intent. In *Clark* v. *United States*, 289 U. S. 1, 17, this Court abrogated the expurgation doctrine in federal contempt proceedings and said, "It has been rejected generally in the states", citing for New Jersey the case of *Re Singer*, 105 N. J. Eq. 220, 147 Atl. 328. This Court was apparently unaware in the *Clark* case that the *Singer* decision in 105 *N. J. Eq.* had been reversed by New Jersey's Court of Errors and Appeals in *In re Singer*, 109 N. J. Eq. 103 (E. & A. 1931). The *Singer* decision in 109 *N. J. Eq.* (at p. 105) expressly preserves the doctrine that "Disavowal of any intention to commit a contempt may, however, extenuate or even purge the contempt." The *Singer* decision in 109 *N. J. Eq.* has never been disapproved or even criticized. It is apparently still the law in New Jersey. Earlier New Jersey decisions permit of no doubt that some form of the expurgation doctrine, combined occasionally with a right of defense of justification, long ago became rooted in that State. *In re Cheeseman*, 49 N. J. L. 115, 143 (S. Ct. 1886) ("a fair opportunity of denying or confessing [the] truth [of the charges]") (cited with approval in *In re Frank*, 135 N. J. L. 429, 432 (S. Ct. 1947), which in turn is cited with approval in *In re Tiene*, 17 N. J. 170, 180 (1954)); *In re Gonzales*, 88 N. J. L. 536 (S. Ct. 1910); *In re Schmidt*, 88 N. J. Eq. 21, 24 (Ch. 1917). The

appellant in this case was shut off from all opportunity to develop the defensive facts, concerning his intent, that might have obtained for him a purgation or at least a mitigation of sentence under the doctrine above mentioned. This foreclosing of opportunity for defense was not harmless because the defense in question, as seen, has vitality and reality in New Jersey. The foreclosing of opportunity was the product, we submit, of the way in which the summary procedures called into being by R.R. 3:8 were applied to the appellant. And thereby arises another important aspect of our claim of federal constitutional aggrievement, cognizable by this Court, we submit, under 28 U. S. C. Sec. 1257(2).

8. Apart from the questions as to the doctrine of expurgation as such, the defense of lack of criminal intent is constitutionally indefeasible because of its bearing on mitigation of punishment. *Cooke* v. *United States*, 267 U. S. 517, 538, which, as seen, formulates in due process terms the right to defend on the issue of intent, expressly holds also that even where the allegedly contumacious statement is admitted by the defendant as having been made by him, "the intention * * * must necessarily and properly have an important bearing on the degree of guilt and the penalty which should be imposed, [and] the court cannot properly exclude evidence in mitigation. It is a proper part of the defense." To the same effect see *State* v. *Eno*, 145 W. Va. 473, 63 S. E. 2d 845 (1951). See also *Brown* v. *United States*, —— U. S. ——, 3 L. Ed. 2d 609, 620-621 (dissenting op.). New Jersey cases in accord are: *In re Singer*, 109 N. J. Eq. 103, 105 (E. & A. 1931); In re *Cooley*, 95 N. J. Eq. 485, 487-488 (Ch. 1924), aff'd, 103 N. J. Eq. 377 (E. & A. 1928); *In re Henn*, 113 N. J. Eq 155, 158 (Ch. 1933), order to show cause discharged, 114 N. J. Eq. 452 (Ch. 1933); *In re Hand*, 89 N. J. Eq. 469, 470 (Ch. 1918) (taking into consideration the respondent's "great mental strain" occasioned by a financial setback in the litigation).

9. The specific procedural right which the appellant wanted and was denied in connection with his attempted defense of lack of criminal intent was the right to have the court consider the transcript in the matrimonial proceeding, where the appellant believed justification would be found for his allegedly contemptuous remarks. App. S. Ct. N. J. 19a, lines 16 to 21. *Offutt* v. *United States*, 232 F. 2d 69 (C. A. D. C. 1956), cert. den., 351 U. S. 988, is closely similar to the instant case as respects such claim of right by a defendant in criminal contempt proceedings. The *Offutt* case upholds the right and expressly rests it upon the procedural due process principle announced in *Cooke* v. *United States*, 267 U. S. 517, 537. Cf. *Nilva* v. *United States*, 227 F. 2d 74, 78-79 (C. A. 8, 1955), reh. den., 228 F. 2d 134, aff'd, 352 U. S. 385.

IV.

The Attorney General's statement that "none" of appellant's "contentions was timely advanced in the New Jersey courts * * *" (Mot. p. 6) is incomprehensible. Our Jurisdictional Statement (pp. 13-18) gives the appropriate record references. *One* of our contentions is perhaps not adequately preserved for appeal to this Court, namely, the contention as to the inadequacy of the notice that the charge was criminal contempt.[3] We have heretofore sug-

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[3] Jurisdictional Statement, question No. 4, pp. 4-5; *Id.*, p. 25. See also the exhaustive study of the point in *United States* v. *United Mine Workers*, 330 U. S. 258, 368-376 (dissenting Op.); *Brown* v. *United States*, —— U. S. ——, 3 L. ed. 2d 609, 623 (dissenting Op.); *Parker* v. *United States*, 153 F. 2d 66, 70 (C. C. A. 1, 1946). See especially, for its striking factual resemblance to the situation at bar, *Western Fruit Growers* v. *Gotfried*, 136 F. 2d 98, 101 (C. C. A. 9, 1943) ("* * * Not until the trial in the District Court was actually in progress were the appellants definitely notified that

(Continued on following page)

gested that this point was sufficiently preserved in view of its being interwoven throughout with the jury trial point and with the objections to the post-haste "summariness" of the contempt proceeding. Jurisdictional Statement, pp. 14, 15, 17, 18, 25.

V.

The Attorney General's suggestion (Mot. p. 9) that appellant could have introduced new evidence in the state appellate courts ignores *Zimmerman* v. *Zimmerman*, 12 N. J. Super. 61, 69 App. Div. 1950), cited in our Jurisdictional Statement, p. 23. Even more conclusive against the Attorney General's suggestion is *State* v. *Zarafu*, 35 N. J. Super. 177, 183-184 (App. Div. 1955). In any event, "* * * even at its rare best appellate review cannot begin to take the place of trial in the first instance by an impartial jury subject to review on the spot by an uncommitted trial judge." *Green* v. *United States*, 356 U. S. 165, 200 (dissenting op.).

CONCLUSION

It is respectfully submitted that the motion of the Attorney General of New Jersey should be denied.

Respectfully submitted,

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Attorneys for Appellant.

AARON W. NUSSMAN,
Of Counsel.

(Continued from preceding page)

the contempt was criminal in character. Therefore, the contemnors were not aware at the out-set of the criminal nature of the proceeding.") Cf. also *In re Tiene*, 17 N. J. 170, 182 (1954); *Passaic-Atlenia Bus Co.* v. *Consolidated Bus Co.*, 100 N. J. Eq. 188, 192 (Ch. 1926); *Dorrian* v *Davis*, 105 N. J. Eq. 147 (Ch. 1929).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 803

IN THE MATTER

of

SIDNEY SARNER,
Charged With Criminal Contempt,

Appellant.

ON APPEAL FROM FINAL JUDGMENT OF
THE SUPREME COURT OF NEW JERSEY

PETITION FOR REHEARING OF ORDER GRANTING MOTION TO DISMISS APPEAL AND DISMISSING APPEAL

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IN THE

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SIDNEY SARNER,
Charged With Criminal Contempt,

Appellant.

PETITION FOR REHEARING OF ORDER GRANTING MOTION TO DISMISS APPEAL AND DISMISSING APPEAL

Appellant prays that this Court grant rehearing of its order of May 25, 1959, which granted the motion of the Attorney General of New Jersey to dismiss the appeal, and dismissed the appeal.

Reasons for Granting Rehearing and Entertaining the Appeal

1. This Court's order of May 25, 1959 being silent as to the reason for the dismissal of the appeal, appellant is venturing to submit this petition for rehearing on the *assumption* that there may possibly be some significance

(potentially favorable to the appellant) in the Court's having refrained from expressly declaring either that the appeal lacks a substantial federal question, or that the appeal lacks a properly presented federal question. In other words, by reason of the noncommital form of the order of May 25, 1959, it may be appropriate for appellant to attempt a concise re-presentation of the principal federal questions involved and, more especially, of the way in which those questions arise. As appellant reads Rule 58 of the Rules of this Court, a petition for rehearing of an order dismissing an appeal is governed by paragraph 1, rather than by paragraph 2, of Rule 58, so that the present petition for rehearing would not seem to be subject to the requirements of Rule 58(2) as to "intervening circumstances" etc. in cases of certiorari jurisdiction.

2. Appellant realizes—and he so indicated in the Jurisdictional Statement, pp. 4, 20-25—that he cannot expect this Court to entertain his Fourteenth Amendment jury trial contention in this case of criminal contempt unless the Court is disposed to examine *de novo* two propositions of constitutional law which have long been assumed to be settled. Those two propositions are: (1) that the Fourteenth Amendment does not require jury trial in state prosecutions for crime; and (2) that the Fourteenth Amendment does not require jury trial in state prosecutions for criminal contempt. As to the first of the above two propositions, we showed in our Jurisdictional Statement (pp. 23-24) that while numerous decisions of this Court contain declarations that the Fourteenth Amendment does not guarantee the right of jury trial in state prosecutions for crime, *there appears to be no decision of this Court which actually so holds in a factual situation where the right of jury trial was denied in toto (as happened in this case).* We showed (*ibid.*) that *all* of the decisions of this Court containing declarations of the kind just mentioned either

were civil cases or were criminal cases involving factual situations short of actual denial of jury trial *in toto*. As to the second proposition above stated, we showed in our Jurisdictional Statement (pp. 20-21) that the case which originally held (nearly seventy years ago) that the Fourteenth Amendment does not require jury trial in state prosecutions for criminal contempt—*Eilenbecker* v. *District Court*, 134 U. S. 31—has only once since then been cited by this Court in a state case of criminal contempt where jury trial was actually demanded and denied; and in that one case (*Fisher* v. *Pace*, 336 U. S. 155, 159n.), the facts involved (1) an attorney (not a layman, as here), (2) who was accused of defiant acts *in facie curiae* (as distinct from the facts here, where appellant spoke allegedly abusive words but did not engage in defiant or obstructive acts), and (3) who was convicted *instanter* (as distinct from the situation in our case where the trial and conviction occurred more than three months after the allegedly contemptuous words were spoken and after the court proceedings involved had been undisturbedly concluded). We also suggested in our Jurisdictional Statement (pp. 20-21) that the exhaustive scholarship devoted by the Court to the contempt-jury trial question in *Green* v. *United States*, 356 U. S. 156, dealing as it did in that case with the *federal* power, did not necessarily dispose of the jury trial question in *state* contempt cases. It is true that the historical-legal materials relating to the no-jury rule in criminal contempt cases are not wholly identical with the materials relating to the Fourteenth Amendment jury trial question in state *criminal* cases as such. That is, theoretically this Court might reaffirm the *Eilenbecker* rule (no Fourteenth Amendment requirement of jury trial in state criminal contempt cases), even if it were to re-examine the no-jury rule in state criminal prosecutions as such and were to abrogate the later rule. But is it likely that *Eilenbecker*

could stand if it were to be held that the Fourteenth Amendment requires jury trial in state criminal prosecutions? It is in the light of this last-stated hypothetical question of constitutional law, that we urge this Court to reconsider our demonstration (Jurisdictional Statement, pp. 23-24) of the rather remarkable fact that this Court has never actually *held* that the Fourteenth Amendment does not require a jury trial in a state criminal prosecution where jury trial was actually denied *in toto*.

3. Within the space limitations of the Jurisdictional Statement we were unable to set forth *in extenso* the portions of the record and briefs below which show how the federal questions are presented, although we did cite all of the pertinent references to the record and to those briefs (Jurisdictional Statement, pp. 13-18). Also, we did not call attention in our Jurisdictional Statement to the decisions of this Court to the effect that when the highest state court considers and decides federal questions this Court may take the case on the assumption that the federal issues were properly raised. E.g., *Charleston Federal Savings & Loan Ass'n* v. *Alderson*, 324 U. S. 182, 185-186; *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 267-268; *Whitney* v. *California*, 274 U. S. 357, 360-361. As shown in our Jurisdictional Statement (pp. 15-17, 18), the Supreme Court of New Jersey (whose *per curiam* opinion consisted of a *verbatim* adoption of the opinion of the Appellate Division) expressly considered and rejected appellant's federal constitutional contentions as to jury trial (Jurisdictional Statement, Appendix A, pp. 6a to 7a), and free speech (id., p. 6a). On the jury trial point the Court expressly cited New Jersey's R.R. 3:8-3 as permitting discretionary denial (id., p. 7a, line 11).

4. In this petition for rehearing we refrain from presenting additional argument on the due process issues of adequate notice and hearing (Jurisdictional Statement, pp.

3-5, 19, 25-26), because we are proceeding under the provisions of Rule 58(1), and these last mentioned issues might not be thought to arise so plainly within the appellate jurisdiction of this Court as is true of the jury trial issue. We do, however, respectfully adhere to our position that the extreme summariness of the procedure used in trying and convicting the appellant was generated by, or consisted of applying to the appellant, the provisions of New Jersey's R.R. 3:8—so that a proper issue on appeal is presented in this respect.

CONCLUSION

For the reasons set forth above and in the Jurisdictional Statement and the Reply Brief for appellant, it is respectfully urged that rehearing be granted and that, upon such rehearing, this Court should entertain the appeal to consider our contentions that the decision below has construed and applied New Jersey's R.R. 3:8 so as to deny to the appellant his rights of jury trial, freedom of speech, and adequate notice and hearing in violation of the Fourteenth Amendment. Appellant further respectfully prays that, if such should be deemed by the Court appropriate within the framework of a rehearing governed by Rule 58(1), and if this matter should still be deemed to present no proper case for appeal, the Court may grant rehearing for the purpose of treating the papers as a petition for a writ of certiorari and that, upon such rehearing, a writ of certiorari issue to the Supreme Court of New Jersey.

Respectfully submitted,

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AARON W. NUSSMAN,
Of Counsel.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

AARON W. NUSSMAN,
Counsel for Appellant.